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91-758

No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

PONCIANO CRUZ RASA,
OSCAR CRUZ RASA,
LEO SABLAN PANGELINAN,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

This Petition raises the following questions in the context of the prosecution for political corruption, by the United States Government, of the President of the Senate of the Commonwealth of the Northern Mariana Islands; the Senator's brother (a former Speaker of the Commonwealth House of Representatives, the Senator's political advisor and a paid consultant to a Senate Committee); and a Commonwealth Senate employee:

1. Did the refusal of the Ninth Circuit to consider whether the government's indictment charged a legally cognizable offense against two of the petitioners, because this jurisdictional challenge was not expressly preserved in their Federal Rule of Criminal Procedure 11(a)(2) conditional guilty pleas, so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

2. Did the trial court's continuance of Petitioners' trial well past the date required by the Speedy Trial Act, solely to accommodate the personal "convenience" of one defense lawyer and the trial court, and the sanction of that trial-court conduct by the Court of Appeals, so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

3. Does an apparent conflict among decisions of the Ninth Circuit, itself, and various other circuits warrant consideration by this Court of whether a trial court may retroactively justify granting an "ends of justice" trial continuance well past the date required by the Speedy Trial Act based upon *post hoc* consideration of the factors specified in the Act?

4. Did the imposition by the trial court of a disproportionately heavy sentence on one of the three Petitioners because he exercised his right to a jury trial and consequently did not "cooperate" with the prosecution, and the reluctant sanction of the trial-court's conduct by the Court of Appeals, so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

LIST OF PARTIES

All parties to the proceeding in the court whose judgment is sought to be reviewed appear in the caption of the case.

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OPINIONS BELOW

1. *United States of America v. Ponciano Cruz Rasa, Oscar Cruz Rasa and Leo S. Pangelinan*, No. 90 Crim. 1007, 10037, 10038 (9th Cir. filed Jan. 31, 1991), *reh'g. denied*, (No. 90 Crim. 1007, 10037, 10038) (9th Cir. filed September 11, 1991). (Appendices A, C).

2. *United States of America v. Ponciano C. Rasa, Oscar C. Rasa, and Leo S. Pangelinan*, No. 89 Crim. 00006 (D.C. N. Mariana Islands August 25, 1989). (Appendix B).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was originally entered on or about January 31, 1991. A Petition for Rehearing and Suggestion for Rehearing En Banc were duly filed by the defendants on or about March 21, 1991 and denied on September 11, 1991. On or about September 18, 1991, defendants filed a Motion for Order Staying Issuance of Mandate Pending Application to the Supreme Court for Writ of Certiorari. That motion was granted on October 2, 1991. This Petition for Writ of Certiorari is being timely filed within 60 days of the ruling of the Ninth Circuit Court of Appeals affirming the decision of the District Court.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1). (Appendix I.)

CONSTITUTIONAL, TREATY AND STATUTORY PROVISIONS INVOLVED

Because the Constitutional provision, treaty and statutes relied upon are lengthy, their citations are listed below, and the pertinent text is set forth in the Appendix.

U.S. CONST. AMEND. VI (Appendix F.)

18 U.S.C. § 1343 (1990) (Appendix M.)

18 U.S.C. § 1951 (1948) (Appendix L.)

18 U.S.C. § 3161(b), (c), (h) (1988) (Appendix G.)

18 U.S.C. § 3162(a)(2) (1979) (Appendix H.)

28 U.S.C. § 1254(1) (1988) (Appendix I.)

Fed. R. Crim. P. 11(a)(2) (Appendix N.)

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Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, 90 Stat. 263 (1976). (Appendix K.)

STATEMENT OF THE CASE

This Petition asserts error of Constitutional proportions by both the trial and appellate courts below, in a prosecution by the United States alleging political corruption on the part of the President of the Senate of the Commonwealth of the Northern Mariana Islands; his brother (a former Speaker of the Commonwealth House of Representatives whose allegedly improper conduct occurred in the course of his employment both as consultant to a Commonwealth Senate Committee chaired by the Senator and as head of the Senator's campaign committee); and an employee of a Commonwealth Senate Committee chaired by the Senator.

On March 17, 1988, a federal grand jury in the district of the Commonwealth of the Northern Mariana Islands issued an indictment against Commonwealth Senator PONCIANO RASA; his brother and political advisor, former Commonwealth House Speaker OSCAR RASA (the "RASAS"; and an alleged accomplice, LEO PANGELINAN ("PANGELINAN"), a consultant to the Commonwealth Senate Committee on Resources, Development and Programs chaired by Senator RASA.

On July 18, 1988, the trial court, on the government's motion, dismissed the original indictment for irregularities in the grand jury selection plan.

On April 21, 1989, a new grand jury issued a second federal indictment against the RASAS and PANGE-

LINAN. The second indictment asserted two federal counts of wire fraud and one federal count of extortion.

In substance, the indictment alleged that the RASAS and PANGELINAN had improperly sold to Japanese contractors a Commonwealth document dealing with the prospective construction by the Commonwealth of a hospital on Saipan; and that the RASAS, together with a Commonwealth Senate attorney, had travelled to Japan to induce the Japanese contractors to make substantial contributions to the Senator's campaign fund in exchange for the Senator's "assistance in aiding or at least not hurting" the contractors' business activities on Saipan.[1]

The purported basis for federal jurisdiction was the wire transfer of money from the New York bank account of the prime contractor on the hospital project to the account of one of the Japanese subcontractors in a bank located in the Commonwealth.[2]

At the same time the government reindicted the RASAS and PANGELINAN, the government also moved for an "ends of justice" continuance pursuant to the Speedy Trial Act since, by the government's calculations, only two days remained of the period within which the Speedy Trial Act required the trial to commence.

Even though well over a year had elapsed since the first indictment, and all three defendants (Petitioners PONCIANO and OSCAR RASA, and LEO PANGELINAN) continued to be represented by their counsel from the

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[1]Indictment, Appendix O *passim*.

[2]Indictment, Appendix O Count 1 § 23. No evidence was offered or introduced that the document gave the contractors who purchased it an unfair advantage in bidding or that either the prime contractor with whom they were bidding or the Commonwealth, itself, paid more for the services they provided as a result.

earlier proceedings, the government predicated its motion to continue the trial on the presumed unpreparedness of defense counsel and the government's own inability to unilaterally set a trial date and issue subpoenas within the two days it asserted remained within which to commence trial.

The trial court summarily granted the motion, prior to hearing from the parties or their counsel, and then set a trial date many months after the date fixed for trial by the Speedy Trial Act, solely for the Court's own convenience and to accommodate the personal plans of PANGELINAN'S lawyer.

After the trial court denied a motion by all three defendants to dismiss the indictment for failure to timely try the matter, the RASAS entered conditional guilty pleas to the wire fraud charges, which expressly preserved their right to appeal the speedy trial ruling. The extortion charges were dismissed. As part of their sentence, the RASAS were ordered incarcerated for three years.

PANGELINAN, however, proceeded to trial and was found "not guilty" of wire fraud, but "guilty" of extortion. When PANGELINAN was sentenced, the trial court ordered him incarcerated for five years, over 66% longer than the punishment imposed on the RASAS less than two weeks earlier. The Court justified its sentence of PANGELINAN by reference to a perceived difference between people who plead guilty and cooperate with the government and those, like PANGELINAN, who plead *not* guilty but are later found guilty after a jury trial.

All three defendants appealed to the Ninth Circuit, asserting, *inter alia*, Constitutional and statutory speedy trial issues; the Constitutional question raised by sentenc-

ing PANGELINAN based on a perceived difference between defendants who cooperate and those who choose to go to trial; and an attack on the jurisdiction of the trial court based on the asserted failure of the second indictment to charge an offense.[3]

In an unpublished opinion, the Court of Appeals rejected these, among other, claims, because:

1. The newly-raised jurisdictional issue was not properly preserved by the RASAS' conditional guilty plea;

2. Although the Court of Appeals made no inquiry into justification for the *length* of the continuance, it considered the grant of *some* continuance justified because neither side reasonably have been expected to go to trial in two days; and

3. While it disapproved of the trial court's comments regarding cooperation with the judicial system and called the issue "very close," the Court of Appeals accepted at face value statements by the trial court, made after it was challenged on the Constitutional implications of its comments, that it really was not punishing PANGELINAN for going to trial.

Petitioners' motion for rehearing *en banc* was denied.

This Petition timely ensued.

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[3] The thrust of this argument, concededly raised for the first time on appeal, is that the prosecution by federal authorities of alleged misconduct, in office, of Commonwealth officials constitutes an impermissible federal intrusion into the internal affairs of the Commonwealth, in violation of § 103 of the Covenant between the Commonwealth and the United States, which created and which controls their political "union", and which expressly reserves to the Commonwealth the right of self-governance respecting internal affairs.

ARGUMENT

I. THE COURT OF APPEALS NOT ONLY ERRED GRIEVOUSLY BY REFUSING TO CONSIDER PETITIONERS' JURISDICTIONAL ARGUMENTS, BY DOING SO IT DECLINED TO ADDRESS A QUESTION OF EXCEPTIONAL IMPORTANCE RESPECTING THE INTRUSION OF THE UNITED STATES INTO THE INTERNAL AFFAIRS OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS.

The question of whether the second indictment failed to charge an offense was concededly raised for the first time in the Court of Appeals. That court declined to consider the issue because the RASAS, who first asserted that deficiency, had not expressly preserved that question in their Federal Rule of Criminal Procedure 11(a)(2) conditional guilty pleas.

At the risk of placing the cart before the horse, we will first discuss the critical importance of the issue which the Court of Appeals declined to address, and then turn to a discussion of the lower court's startling departure from the long-established rule that jurisdictional defects, generally, and attacks an indictments for failure to charge an offense in particular, *must* be considered *whenever* they are raised.

The RASAS' brief, below, advanced the following contention:

> [T]he authority of the United States towards the CNMI arises solely under the Covenant [to Establish a Commonwealth of the Northern Mariana Islands in Political Union With the United States of America]." (*Hillblom v. United States,* No. 88-15494, slip op. at 1871, 1876 (9th Cir. Feb. 21, 1990).] Section 103 of the

> Covenant provides: "The people of the Northern Mariana Islands will have the right of local self-government and will govern themselves with respect to internal affairs in accordance with a Constitution of their own adoption." (Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union With the United States of America § 103, Pub. L. No. 94-241, 90 Stat. 263, 264 (1976), *reprinted in* 18 U.S.C.A. § 1681 historical and statutory notes at 539 (1987).) The present case usurps that right[.]

(Brief of Defendant-Appellants at 6.)[4]

The Covenant referred to above culminated in historical events which commenced with the successive subjugation of the native inhabitants of numerous western Pacific islands by the Spanish, Germans, and Japanese; their liberation by American military forces during World War II; and the creation by the United Nations of a trusteeship over those islands pursuant to which the United States, as U.N. Trustee, was obligated to "promote the development of the inhabitants of the Trust Territory toward self-government or independence." *United States of America ex rel. Richards v. Sablan,* 1989 U.S. Dist. Lexis 16786 (U.S.D.C. North. Mar. Isl. Oct. 27, 1989.)

The Northern Mariana Islands were part of this trust territory. Rather than seeking pure independence, on the one hand, or statehood, on the other, the people of the Northern Mariana Islands chose to pursue a political

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[4]Because of the extreme importance of clearly defining the proper scope of the authority vested in the United States, on the one hand, and the Commonwealth, on the other, we respectfully suggest that the Court invite the Attorney General of the Commonwealth to participate in these proceedings.

relationship with the United States which lay somewhere in between.

The nature of this "political union" is established by the Covenant, an agreement between the United States and the people of the Northern Marianas which became fully operational only after approval by the people of the Northern Marianas, the Congress of the United States, and the United Nations. Covenant to establish the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, 90 Stat. 263 (1976). (Appendix K). The Covenant became fully effective on November 3, 1986, by Presidential Proclamation. Presidential Proclamation No. 5564, 51 Fed. Reg. 40399 (1986).

It was the thrust of the RASAS' argument below that, for the following reasons, the federal government's attempts to prosecute Commonwealth officials for alleged political wrongdoing contravened the limitations on federal intrusion into local affairs.

A. Neither Federal Laws on Wire and Mail Fraud Nor The Hobbs Act Apply to State Officials of The Commonwealth.

1. Under the Covenant, The Authority of the United States is Limited to Foreign Affairs and Defense. It Expressly Excludes Federal Intrusion into Internal Affairs.

In January, 1978, the Commonwealth of the Northern Mariana Islands (the "Commonwealth") entered into a relationship with the United States pursuant to an agreement entitled the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States. Covenant to establish the Northern Mariana Islands in Political Union with the United States

of America, Pub. L. No. 94-241, 90 Stat. 263 (1976). (Appendix K). Pursuant to the terms of the Covenant, the people of the Commonwealth expressly reserved to themselves the right of local self-government and management of their own internal affairs, while control of the Commonwealth's international affairs and defense was delegated to the United States. *Hillblom v. United States*, 896 F.2d 426, 427-428 (9th Cir. 1990).

This relationship is different from, but not unlike, the relationship between the United States federal government and the states, as expressed in the tenth amendment to the United States Constitution: "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." United States Constitution, 10th Amendment.

One obvious difference is that the document which accomplishes this delegation of powers from the Commonwealth to the federal government is the Covenant, not the United States Constitution. Nonetheless, the basic notion is that the United States federal government has no more than the powers enumerated in the granting document, in contrast to the states (or in this case, the Commonwealth) which retain all other governmental powers.

Another major difference between the Commonwealth and the states is that Commonwealth voters cannot vote for members of the United States Congress, so that United States control over Commonwealth activities is, by definition, legislation without representation. *Hillblom*, 896 F.2d at 427. Because of this lack of representation, all actions of the United States that have an effect on the Commonwealth and its citizens must comply scrupulously with the Covenant and must be appropriately circumscribed. Thus, although the parallel with states' rights

certainly exists, any doubts over controlling law should be resolved in favor of the Commonwealth over the United States, due to this lack of representation, if for no other reason.

2. Acts of the United States Pursuant to the Commerce Clause Do Not Apply to the Commonwealth.

Pursuant to the Covenant indicates that only certain parts of the United States Constitution apply to the Commonwealth. *Id.* at 428. For example, the Commerce and Supremacy clauses are expressly and specifically excluded in their entirety. *Id.* Accordingly, since "the authority of the United States towards the . . . [Commonwealth] arises solely under the Covenant," any actions taken by the United States pursuant to these clauses having an impact on local self-government or internal affairs are beyond the powers of the United States, are unauthorized by the Covenant and therefore invalid.[5] *Id.* at 429.

The indictment in this action specifically reference the use of interstate and foreign commerce facilities pursuant to Title 18, United States Code, section 1343 in counts

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[5]Unfortunately, after setting forth this interpretation of the scope of the powers of the United States, which is very supportive of defendants' position, the *Hillblom* court then declined to rule on any of the issues presented to it under the ripeness doctrine. *Hillblom*, 896 F.2d at 430. The plaintiffs had based their allegations not on any specific statutes violative of the Covenant but soley on "potential future acts of the U.S. Congress" and had "yet to suffer the type of injury which warrants judicial intervention." *Id.* at 430, 431.

The instant case, of course, presents *actual* facts upon which an analysis of the scope of permissible federal intrusion into distinctively internal Commonwealth affairs could and should be predicated. This opportunity should not be lost.

one and two. Counts three and four reference Title 18, United States Code, section 1951, commonly known as the Hobbs Act. One requirement of the Hobbs Act is that trade or commerce must be affected by the alleged wrongdoing. *Carbo v. United States*, 314 F.2d 718, 732 (9th Cir. 1963). Both of these laws were enacted under the commerce power, which, as discussed above, does not apply to the Commonwealth pursuant to the express language of the Covenant.

In addition, count three alleges that one object of the conspiracy was to "induce the consent and payment of money under color of official right that is by the actual, apparent, and potential authority and influence of PONCIANO CRUZ RASA's official position and future position in the CNMI [Commonwealth] government, and the authority and influence of Mariano Reyes Bermudes' official position in the CNMI government." (Indictment, Appendix O, Count 3, § 9(c).) Similarly, count four alleges that defendants obtained money unlawfully "under the real or apparent authority of PONCIANO CRUZ RASA's and Mariano Reyes Bermudes' official position in the CNMI government." (Indictment, Appendix O, Count 4, § 2.)

Thus, not only are the laws themselves inapplicable to the Commonwealth because of their commerce power affiliation, the interpretation of these laws is critically dependent upon the extent and scope of the official positions of all three defendants. PONCIANO RASA was a Senator of the Commonwealth; OSCAR RASA was a fundraiser and leader for Ponciano Crus RASA's political activities; and LEO PANGELINAN was a consultant to the Commonwealth Senate. Thus, by prosecuting Commonwealth officials, the United States federal government in this action intruded into one of the most fundamental

areas of local government, conduct expressly forbidden by the Covenant, seeking to punish Commonwealth public officials without regard to Commonwealth law and custom.

B. Acts Of The United States That Are Not Authorized By The Covenant Or Are Not In Accordance With Local Law And Custom Are Impermissible.

Even when application of a specific section of the United States Constitution is applied by the Covenant, such as the equal protection clause of the fourteenth amendment, it is interpreted in a distinctly local fashion. In *Wabol v. Villacrusis*, 908 F.2d 411 (1990), the Ninth Circuit upheld the Commonwealth's unique restriction of ownership of long-term real estate interests to persons of native descent notwithstanding the inconsistency of this local custom and law with American Constitutional "equal protection" concepts and Anglo-American resistance to restraints on alienation.

It is noteworthy that the Covenant expressly *excludes* the application of the commerce and supremacy clauses from Commonwealth affairs. This exclusionary clause should be given the same weight as in *Wabol* and legislation based on these clauses should not be applicable to Petitioners.

Furthermore, the emphasis given to local systems, culture, and values regarding the nature and scope of the authority of Commonwealth officials should likewise predominate over the tenuous application of federal mail fraud and Hobbs Act statutes to discipline Commonwealth politicians.

II. THE COURT OF APPEALS' REFUSAL TO CONSIDER WHETHER THE INDICTMENT FAILED TO CHARGE AN OFFENSE CONTRAVENED AN EXPRESS PROVISION OF FEDERAL RULE OF CRIMINAL PROCEDURE 12 AND VIOLATED LONG-ESTABLISHED LEGAL PRECEDENT.

The Ninth Circuit's refusal to consider the RASAS' jurisdictional arguments because it was not expressly preserved in their conditional guilty pleas is directly contrary to federal statutory and case law. Federal Rule of Criminal Procedure 12(b)(2) states, in pertinent part that defenses and objections based on defects in an indictment or information must be raised prior to trial "... (*other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings*); ..." (Emphasis added.) Fed. R. Crim. P. 12(b)(2)

Not surprisingly, Ninth Circuit opinions have been consistent with the explicit language of Rule 12(b)(2). In *United States v. Caperell*, 938 F.2d 975 (9th Cir. 1991), for example, the Ninth Circuit expressly held that even a guilty plea does not waive attacks on jurisdiction based on the failure of an indictment to charge an offense, even when the issue is first raised on appeal. *Id.* at 8276; *see also, United States v. Hatch*, 919 F.2d 1394, 1397 (9th Cir. 1990).

It is thus clear that the right to attack the legal sufficiency of the indictment is expressly preserved by Rule 12. *The indictment may be attacked at any time, even after a guilty plea has been entered. United States v. Briscoe*, 428 F.2d 954 (8th Cir. 1970), *cert. denied*, 400 U.S. 966 (1970).

The Ninth Circuit relied on Rule 11(a)(2) of the Federal Rules of Criminal Procedure in refusing to consider several of defendants' assignment of error, including their jurisdictional argument. However, neither Rule 11, nor the case law based upon that rule, suggests that Rule 11 in some manner nullifies or alters the express language of Rule 12(b)(2) which provides that jurisdictional arguments, including an argument that the indictment fails to state an offense, may be raised *at any time.*

Jurisdiction is never waived. If it is not raised by the defendant, it is proper for *any* court to raise the issue *sua sponte. United States v. Stewart*, 727 F.Supp. 1068, 1069 (N.D.Tex. 1989).

In light of the explicit language of Rule 12(b)(2) and extensive case law based on that rule, the Ninth Circuit not only erred in refusing to consider the RASAS' jurisdictional argument, it so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

III. DEFENDANTS WERE NOT BROUGHT TO TRIAL WITHIN THE TIME LIMIT REQUIRED BY THE SPEEDY TRIAL ACT.

As previously stated, Petitioners were first indicted on March 17, 1988. This initial indictment was dismissed, without prejudice, because of irregularities in the grand jury selection plan. They were reindicted on April 21, 1989, at which time the government simultaneously moved for a trial continuance under the Speedy Trial Act "ends of justice" exclusion (18 U.S.C.A. § 3161(h)(8)(A)) since, by the government's calculations, only two days remained of the period within which the Speedy Trial Act required trial to commence.

Even though well over a year had elapsed since the first indictment, and even though Petitioners continued to be represented by their counsel from the earlier proceedings, the government obliquely asserted in its moving papers the presumed unpreparedness of defense counsel and its own procedural problems as its reasons for the requested continuances.

Because the trial court granted the continuance before hearing from the parties or their counsel, the motion, admittedly unopposed by petitioners, must have been granted *solely* on the basis of the government's speculation that defendants "might not even have been notified . . . [and] may no longer have counsel to represent them . . . " and on the basis that the government " . . . could not be ready for an immediate trial because of the impossibility of unilaterally setting a trial date and issuing subpoenas." (*Id.*)

In fact, without making any inquiry whatsoever into either the preparedness of counsel or the validity of the governments' purported subpoena problem, the court granted the motion, for the following reasons:

> THE COURT: The Court agrees that *neither defense counsel nor the attorney for the government would have reasonable time necessary for effective preparation, taking into account the exercise in due diligence to prepare this case.* Also, *it would be unreasonable to expect adequate preparation in only the two days suggested.* It would limit it and *a miscarriage of justice might result*, and therefore coupled with the fact that there is no opposition from the defense counsel, the motion is granted.

(Transcript of Arraignment, Appendix E, p. 20a)

After first accepting a not guilty plea from one of the Petitioners, the trial court then turned to consideration of setting specific motion and trial dates. Counsel for the RASAS informed the court that, "[C]ounsel are all in agreement that [they] would go to trial on July the 17th." (Transcript of Arraignment, Appendix E, p. 21a).

The trial court, however, rejected this date as *inconvenient:*

> "THE COURT: **That date is not going to be convenient for the Court.** I had in mind — specifically, I won't be on island on that date."

(*Id.* emphasis added).

To avoid this inconvenience, the court suggested commencing trial on August 1st, which unfortunately interfered with the plans of PANGELINAN's lawyer, Mr. White. According to Mr. White:

> "MR. WHITE: Your Honor, I expect to be off island most of the month of August. I have had plans for nearly two years to be somewhere else for the first two weeks. My child is about to enter school in Hawaii and that's the last month I can move her."

(*Id.* at 22a.)

There followed an extensive colloquy involving the convenience of both the trial court and counsel during which various counsel discussed their "plans." The trial court stated, "Quite frankly June would be inconvenient for the Court at this late date." (*Id.* at 23a.) Travel arrangement difficulties raised by Labor Day were also discussed, and a trial date of September 6th was finally established.[6]

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[6]Accepting the Government's representation that only two days remained to bring the matter to trial when it moved for a continuance

During this colloquy, counsel for the RASAS stated that the earliest he could be prepared for trial was July 17, even though he had been involved in representing them in the earlier proceedings. (*Id.* at 22a.) PANGELINAN's lawyer said nothing about lack of preparedness. The government prevaricated, but suggested June or early July as an appropriate time for trial. (*Id.* at 23a.)

This extensive discussion, of course, all occurred after the trial court found that a continuance would serve the ends of justice because "a miscarriage of justice *might* result" if trial commenced a mere two days after the indictment. Yet the record is absolutely devoid of evidence of a valid justification for continuing the trial well beyond the time necessary for the RASAS' lawyer to prepare for trial.

To the contrary, it is undeniable that the matter was continued to September 6 for the *convenience* of the Trial Court and one of the defense counsel, and *for no other reason.*

This, we submit, makes a mockery of the Constitutional guarantee of a speedy trial, as embodied in the Speedy Trial Act.

Congress enacted the Speedy Trial Act to "give effect to the Sixth Amendment right to a speedy trial" by setting specified time limits after arraignment or indictment within which criminal trials must be commenced.[7]

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on April 21, 1989, well over six months expired between when the "speedy trial" clock started running and September 6, 1989 trial date finally set.

[7]The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." U.S. Const. amend. IV. Of course, the protections of the Act go beyond those secured by the Sixth Amendment because the Constitution does

United States v. Brooks, 697 F.2d 517, 520 (3d Cir. 1982), *cert. denied,* 460 U.S. 1073 (1983); H.R. Rep. No. 1508, 93d Cong., 2d Sess. (1974), *reprinted in,* 1974 U.S.C.C. A.N. 7401, 7402 ("House Report"). A defendant must be brought to trial within seventy days following his indictment or first appearance before the court, whichever occurs later. *Brooks,* 697 F.2d at 520; 18 U.S.C. § 3161(C). Otherwise, a dismissal of the indictment is required. *United States v. Nance,* 666 F.2d 353, 355 (9th Cir.) *cert. denied,* 456 U.S. 918 (1982); 18 U.S.C. § 3162(a)(2).

Certain periods of delay are excluded from the calculation of the seventy-day time limit. *Brooks,* 697 F.2d at 520. Specifically, Section 3161(h)(8)(A) provides that the court may exclude any period of delay resulting from a continuance granted by the judge on his motion or the request of either party *"if the judge granted such continuance on the basis of its findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in the speedy trial."* *Brooks,* 697 F.2d at 520; *United States v. Frey,* 735 F.2d 350, 352 (9th Cir. 1984) (emphasis added).

It is thus clear that both the public's interest in a speedy trial and the defendants' interest in a speedy trial must be carefully and specifically weighed against the specified reasons for continuance before a proper determination can be made that the continuance will serve the "ends of justice." The record simply does not show such analysis.

Further, Congress imposed two explicit limitations on a court's discretion to grant such continuances. First, the Court must explain its weighing and balancing process in

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not require that a trial commence within a specified time. *See, Barker v. Wingo,* 407 U.S. 514 (1972).

the record. 18 U.S.C. § 3161(h)(8)(A); *Brooks*, 697 F.2d at 520; *Frey*, 735 F.2d at 352.

Second, to insure that "the continuance provision ... not be invoked for reasons other than those which meet the ends of justice," the Act expressly lists and limits the factors which may be considered by a trial court before a continuance can be granted. (*See,* Appendix G.) House Report at 7426. 18 U.S.C. § 3161(h)(8)(B).

In the instant case, the trial court had neither considered nor relied upon the required factors when it granted the governments' motion for continuance. Nor did its *post hoc* discussions cure this fatal defect.

A. The Trial Judge Failed to Consider the Factors Required by Statute to Justify the Length of the Trial Continuance

The "ends of justice" exclusion was included in the Speedy Trial Act "in response to the concern that courts need discretion to respond to characteristics of individual cases similar to those granted automatic exclusion." *Nance*, 666 F.2d at 335. However, the discretion granted to the trial court to invoke the "ends of justice" exception is narrow. *Id.* "Realizing that broad discretion would undermine the mandatory time limits of the Act", Congress intended that the "ends of justice" continuance be "rarely used." *Id. See also, Frey*, 735 F.2d at 352.

Accordingly, the Act enumerates limited factors that must be relied upon by the District Court before a continuance can be granted. 18 U.S.C. § 3161(h)(8)(B); House Report at 7426. *See also United States v. Perez-Reveles*, 715 F.2d 1348, 1352 (9th Cir. 1983). As the legislative history of the Act makes clear, those reasons must be "set forth with particularity." *Id.*; House Report at 7426. *See also, United States v. Rush*, 738 F.2d 497, 507

(1st Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985). This simply was not done in this case.

Two purposes are served by the requirement that a trial court explicitly set forth, in the record, its reasons for granting an "ends of justice" continuance. First, Congress wanted to insure that trial judges give careful consideration to the enumerated factors when balancing the need for delay against "the interest of the defendant and of society in achieving speedy trial." *Brooks*, 697 F.2d at 520; S. Rep. No. 1021, 93d Cong., 2d Sess. 39 (1974) ("Senate Report"). *See also, United States v. Tunnessen*, 763 F.2d 74, 77 (2nd Cir. 1985); *United States v. Doran*, 882 F.2d 1511, 1515 (10th Cir. 1989). Second, the requirement provides a record so that an appellate court may review the decision for compliance with the statutory mandate. *Brooks*, 697 F.2d at 520. *See also, Tunnessen*, 763 F.2d at 77; *Doran*, 882 F.2d at 1515. If a trial court's statements do not comport with these two purposes, they are not sufficient to satisfy the statutory command that "reasons" be set forth "in the record of the case." *Brooks*, 697 F.2d at 520; 18 U.S.C. § 3161(h)(8)(A). Therefore, without properly explained reasons, any delay caused by a continuance is not an excludable item. *Brooks*, 697 F.2d at 520.

In passing the Act, Congress intended to eliminate the time-honored (and much abused) practice of granting continuances as a matter of course. *Perez-Reveles*, 715 F.2d at 1352. Consequently, the Act provides that "*[n]o continuance . . . shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the . . . Government.*" *Id.; Nance*, 666 F.2d at 355-56; 18 U.S.C. § 3161(h)(8)(C) (emphasis added).

Further, the number and scope of factors which properly may be relied upon in granting an "ends of justice" continuance under the Act is carefully circumscribed. *United States v. Fielding*, 645 F.2d 719, 721 (9th Cir. 1981). "Failure to consider factors which the Act requires to be considered, or consideration of factors which the Act excludes from consideration, would be an action contrary to law and normally reversible error." *Id.* That, of course, is precisely what occurred in this case. The convenience of the court and one defense counsel simply could not outweigh the right of the people and the right of Petitioners to a speedy trial.

Notwithstanding the fact that the government, and the Petitioners and their lawyers, all had been well aware of the need to prepare for trial since the original indictment more than a year earlier, both counsel for the government and the RASAs asserted, or at least suggested, some need for additional trial preparation during the colloquy which *followed* the granting of the continuance.[9]

We do not quarrel with the actual grant of the continuance to permit the government to round up witnesses and to permit counsel for the RASAS to finalize his trial preparation. We also concede that it is doubtful that all this could have been accomplished in the two days before trial.

However, we do assert most vigorously that the reasons noted by the trial court to justify the *length* of the trial continuance were patently insufficient and contrary to both statute and case law. Further, there were insufficient facts to support a finding of "complexity". In short, the time period between May 18, 1989 and September 6, 1989

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[9] We note here that the new indictment added different counts. The basic facts, however, remained the same.

was not excludable under the Act because the Court made no finding, and — based on the record — could not properly have made a finding that the "ends of justice" served by continuing the trial for almost four months outweighed the best interests of the public and the Petitioners in a speedy trial. *See* 18 U.S.C. § 3161(h)(8)(A); *United States v. Aviles-Alvarez*, 868 F.2d 1108, 1112 (9th Cir. 1989). Consequently, the continuance itself was improper under Section 3161(h)(8) and violated both the public's and the Petitioners' interest under the Speedy Trial Act.

Nowhere in Section 3161(h)(8)(B) is the convenience of the judge or the convenience of the attorneys set forth as proper grounds for determining the *length* of an "ends of justice" continuance. In fact, in *United States v. Crane*, 776 F.2d 600, 605 (6th Cir. 1985), the Sixth Circuit held that the conviction of defendant should be vacated for failure to commence criminal prosecution with the seventy-day limitation, where the failure to commence trial within the limitation period occurred because the trial judge was caught unaware and was going to be out of the country and was occupied with another case until after the limitations period expired. *See also, United States v. Andrews*, 790 F.2d 803, 808 (10th Cir. 1986), *cert. denied*, 481 U.S. 1081 (1987) (neither congested court calendar nor press of judge's other business can excuse delay under Act). Thus, the court herein clearly considered impermissible factors in determining the *length* of the continuance, in violation of the Speedy Trial Act. *See, Fielding*, 645 F.2d at 721 (reversible error). *See also, Crane*, 776 F.2d at 605; *Andrews*, 790 F.2d at 808.

Nor is the general congestion of a court's calendar a permissible factor upon which to base an "ends of justice" continuance. *Nance, supra*, 666 F.2d at 355-56.

If, indeed, his unavailability reflected court congestion, not personal convenience, the trial judge in this case should have sought reassignment to another judge or requested judicial support from the District of Guam, Hawaii or the mainland to try the matter within the seventy-day limit.

Moreover, delays due to the operation of the judicial system must be placed at the government's door with respect to a claimed denial of the right to a speedy trial. *United States v. Jones*, 524 F.2d 834, 849 (D.C. Cir. 1975) (citing *Barker*, 407 U.S. at 527, 529 ("A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process.... [T]he rule we announce today, which comports with constitutional principles, places the primary burden on the courts and the prosecutors to assure that cases are brought to trial.")).

In sum, in the present case, the trial court's findings leave no doubt that the trial continuance was improperly grounded in criteria irrelevant under § 3161(h)(8)(B). The record of May 18, 1989 is devoid of proper findings regarding any valid justification for the significant delay. Consequently, the trial court set defendant's trial date outside the limits of the Act without making an "ends of justice" finding on the record.

B. The Trial Court Failed to Timely Record Its "Ends of Justice" Findings.

To complicate matters, there exists an apparent conflict between two lines of Ninth Circuit cases each followed by some decisions from other circuits, respecting when the factors justifying an "ends of justice" continuance must be considered by the trial court and when the court's rationale must be put in the record.

Several Ninth Circuit cases can be read as holding that *it is too late for a judge to consider the facts and provide the findings required by Section 3161(h)(8) after the continuance has been granted. See, Frey*, 735 F.2d at 352. *See also, United States v. Jordan*, 915 F.2d 563, 566 (9th Cir. 1990); *Aviles-Alvarez*, 868 F.2d at 1112-13. However, another Ninth Circuit case holds that the reasons for the decision need not be entered on the record at the very time the decision is made. *See, United States v. Bryant*, 726 F.2d 510 (9th Cir. 1984). Thus, a conflict of authority appears to exist within the Ninth Circuit as to whether findings can be provided by the judge after the continuance is granted.

To complicate matters further, some circuits tend to follow the Ninth Circuit opinion in *Frey*. *See, Tunnessen*, 763 F.2d at 78-79 (court emphasizes that, where possible, court generally should make the finding required by Section 3161(h)(8)(A) at the time it grants continuance); *United States v. Carey*, 746 F.2d 228, 230 (4th Cir. 1984), *cert. denied*, 470 U.S. 1029 (1985). Other circuits, however, tend to follow the Ninth Circuit opinion in *Bryant* that the Act does not require a contemporaneous recording of reasons. *See, Rush*, 738 F.2d at 507; *Brooks*, 697 F.2d 522; *United States v. Clifford*, 664 F.2d 1090, 1095 (8th Cir. 1981); *United States v. Vasser*, 916 F.2d 624, 627 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 1688 (1991); *United States v. Edwards*, 627 F.2d 460, 461 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 872 (1980). Thus, there may be an apparent conflict of authority among the circuits as well.

Obviously, it would be desirable to secure and maintain a uniformity of decision among the circuits on this issue. Indeed, in the present case, in light of this conflict, it cannot be determined whether the "ends of justice" find-

ings upon which the trial continuance was based were timely and, thus, excludable from the seventy-day limit as set forth in the Act.

We respectfully request the Court to take this opportunity to do so in this case.

IV. THE TRIAL COURT IMPROPERLY BASED PANGELINAN'S INCREASED SENTENCE ON PANGELINAN'S DECISION TO EXERCISE HIS CONSTITUTIONAL RIGHT TO TRIAL RATHER THAN PLEAD GUILTY.

The final issue raised by this Petition is whether the trial court, in determining PANGELINAN's sentence, improperly considered PANGELINAN's decision to exercise his constitutional right to trial rather than plead guilty; and whether the Court of Appeal's reluctant sanction of the trial court's conduct in that respect warrants this Court's exercise of its supervisory powers.[10]

The following quotation constitutes the full text of the rationale given by the trial court prior to imposition of PANGELINAN's sentence:

> *I do think that there is a difference* between the people that plead guilty and cooperate with the government and people that plead guilty and do not cooperate and people that plead not guilty and [are] found guilty by a jury. I think the message has to go out to the community that not only are all of those people who are going to be punished, *but that there's got to be a varying degree*

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[10] "Where infringement of a defendant's constitutional rights is implicated, appellate courts have, indeed, exercised supervisory authority in the administration of justice to review even a sentence within statutory limits." *United States v. Hall*, 778 F.2d 1427, 1429 (9th Cir. 1985) (emphasis added).

> *of punishment based upon the cooperation with the judicial system. I would have to assign your level of cooperation the lowest among those three.* That is pleading guilty and cooperating, pleading and not cooperating, and pleading not guilty and being found guilty, which is being guilty and not cooperating.
>
> *For those reasons, I'm going to order a term of imprisonment. . . .*

(Sentencing Transcript, Appendix D, p. 12a) (emphasis added).

The trial court then immediately imposed a sentence of imprisonment on PANGELINAN some 66% longer than that imposed on PANGELINAN's co-defendants, the RASAS. There can be no doubt that PANGELINAN's refusal to plead guilty, like the RASAS, was *the sole basis* for giving him a longer sentence than the others. It was only after the sentencing judge's error was pointed out that he back-pedaled and tried to provide a *post hoc* justification for the severity of PANGELINAN'S sentence. (Sentencing Transcript, Appendix D, p. 14a.)

Although the Ninth Circuit affirmed the trial court's sentence, it's discomfort with the above-quoted statement by the sentencing judge was obvious: "We do not, however, approve of the district court's comments regarding cooperation with the judicial system. Those comments are troublesome and have made this a very close issue on appeal." Memorandum of the Ninth Circuit Court of Appeals, 1/31/91, at 5, fn. 2. (Appendix A.) The Court of Appeals, however, found the sentencing judge's *post hoc* denial that he was not punishing PANGELINAN for going to trial more compelling than his originally expressed reason for the sentence. *Id.*

Despite his contrary protestations, the sentencing Judge's statements, both before and after recognizing his error, clearly evidence the Court's improper consideration of PANGELINAN's decision to go to trial as a basis for imposing his heavy sentence.

Under established law, PANGELINAN's sentence should have been based "*solely* upon the facts of his case and his personal history, and not as punishment for his refusal to plead guilty." *United States v. Stockwell*, 472 F.2d 1186, 1188 (9th Cir. 1973), *cert. denied*, 411 U.S. 948 (1973) (emphasis added). "The trial court must not penalize the defendant for exercising his constitutional right to plead not guilty and go to trial; whether or not the defendant exercises his right to trial *must have no bearing on the sentence he receives.*" *United States v. Harris*, 635 F.2d 526, 529 (6th Cir. 1980) (emphasis added).

The rule cited in *Stockwell, Harris, United States v. Hall*, 778 F.2d 1427, 1428 (9th Cir. 1985), and *United States v. Capriola,* 537 F.2d 319, 320-21 (9th Cir. 1976), is well-settled in the Ninth and other circuit courts. The policy basis behind this sound rule is as follows: "If there was such a use of the sentencing power, the constitutional right to trial would be impaired. [Citations omitted.] The chilling effect of such a practice upon standing trial would be as real as the chilling effect upon taking an appeal that arises when a defendant appeals, is reconvicted on remand, and receives a greater punishment." *Stockwell, supra*, 472 F.2d at 1187.

Three appellate decisions have specifically rejected sentences because of comments by sentencing judges expressing the same concerns as the trial court's "message to the community." *United States v. Medina-Cervantes*, 690 F.2d 715, 716 (9th Cir. 1982); *United States*

v. Hutchings, 757 F.2d 11, 13 (2nd Cir.), *cert. denied*, 472 U.S. 1031 (1985); *Stockwell*, 472 F.2d at 1187.

Under established law, the trial court should have based its sentence determination "*solely* upon the facts of his case and his personal history . . . ." *Stockwell,* 472 F.2d at 1188 (emphasis added), and not because he exercised his constitutional right to trial rather than plead guilty.

This clear departure from the accepted and usual course of judicial proceedings by the trial court, and its sanction by the Court of Appeals (however reluctant), calls out for the exercise of this Court's power of supervision.

CONCLUSION

Because each of the issues raised by this Petition is special and important, and especially because the jurisdictional question which the Court of Appeal declined to consider poses difficult and critically important issues respecting the emerging "political union" between the United States and the Commonwealth of the Northern Mariana Islands, we respectfully request that our Petition be granted.

Respectfully submitted,

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LEO SABLAN PANGELINAN

Opinion of the United States Court of Appeal for the Ninth Circuit, January 31, 1991

APPENDIX A

No. 90-10007
No. 90-10037
No. 90-10038
NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

PONCIANO CRUZ RASA,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

OSCAR CRUZ RASA,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

LEO S. PANGELINAN,
Defendant-Appellant.

Appeal from the United Stated District Court
for the Northern Mariana Islands
Alex R. Munson, Chief Justice, Presiding

Argued and Submitted November 8, 1990
Honolulu, Hawaii

MEMORANDUM*

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

D.C. No. CR-89-0006-1-ARM
D.C. No. CR-89-0006-2-ARM
D.C. No. CR-89-0006-3-ARM

Before: SKOPIL, BEEZER, and FERNANDEZ, Circuit Judges

Ponciano Cruz Rasa, Oscar Cruz Rasa, and Leo S. Pangelinan were charged with two counts of wire fraud, 18 U.S.C. § 1343 (1988), and with two counts of interfering with commerce by threats or violence, 18 U.S.C. § 1951 (1988). The Rasas pleaded guilty conditionally, reserving their right to appeal a Speedy Trial Act question.[1] The Rasas also raise a jurisdictional question on appeal. Pangelinan proceeded to trial and was found guilty. He joins the Rasas on the Speedy Trial Act question and on the jurisdictional challenge. Pangelinan also contends that the trial court erred in denying his motion for new trial and in sentencing him. We reject all contentions and affirm.

DISCUSSION

1. *Jurisdiction of District Court*

The Rasas and Pangelinan challenge the authority of a non-article III judge to preside over their criminal prosecutions. They assert that the District Court for the Northern Mariana Islands is an article III court and that only an article III judge can preside at criminal trials brought

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[1]The Rasas make several other assignments of error that we do not consider because they were not properly preserved by the Rasas' conditional guilty pleas entered pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure. *See, United States v. Echegoyen*, 799 F.2d 1271, 1276 (9th Cir. 1986); *United States v. Alexander*, 761 F.2d 1294, 1303 (9th Cir. 1985).

under federal criminal statutes. We reject both arguments.

First, the District Court for the Mariana Islands is not an article III court. *Sablan v. Santos,* 634 F.2d 1153, 1155 (9th Cir. 1980). Second, the Supreme Court has held that non-article III judges may preside in non-article III courts hearing cases brought under criminal laws enacted by Congress. *Palmore v. United States,* 411 U.S. 389, 400 (1973) (District of Columbia); *see also United States v. Canel,* 708 F.2d 894, 896-97 (3rd Cir.) (Virgin Islands), *cert. denied,* 464 U.S. 852 (1983).

2. *The Speedy Trial Act*

All defendants assign error to the "ends of justice" continuance granted by the trial court under the Speedy Trial Act. An "ends of justice" continuance will result in excludable delay only if the judge makes a finding "that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A) (1988). Moreover, the court must set forth, "in the record of the case, either orally or in writing, [the] reasons for [its] finding. . . ." *Id.* The court must consider the factors enumerated in 18 U.S.C. § 3161(h)(8)(B), including, among others, whether the failure to grant the continuance would result in a miscarriage of justice or would deny either side reasonable time to prepare.

The district court's findings satisfy the requirements of section 3161(h)(8)(A). The court considered the relevant factors and timely set forth its reasons in the record. The court found that "neither the defense counsel nor the attorney for the government would have reasonable time necessary for effective preparation, taking into account the exercise and due diligence to prepare this case." The

district court correctly found that neither side could reasonably prepare in the time required by the Act, and that "a miscarriage of justice would result" if it did not grant the motion. *See* 18 U.S.C. § 3161(h)(8)(B)(i & iv).

3. *Motion for New Trial*

a. Prosecutorial Remarks

Pangelinan assigns as error the trial court's denial of his motion for a new trial based on the prosecutor's remarks during the rebuttal portion of closing argument. We conclude, as did the district court, that the prosecutor's remarks do not warrant reversal. Some of the challenged comments were made in response to defense counsel's remarks. *See United States v. Chavez-Vernaza,* 844 F.2d 1368, 1377 (9th Cir. 1987) (comments that are "invited" and do nothing more than "right the scale" do not warrant reversal). The remaining comments were either not improper, or even assuming error, were not prejudicial in light of the court's instructions. *See United States v. Castillo,* 866 F.2d 1071, 1083 (9th Cir. 1989) (comment on defendant's failure to present a witness is permissible where comment is not intended to note defendant's failure to testify); *United States v. McKoy,* 771 F.2d 1207, 1213 (9th Cir. 1985) (prosecutor's non-testimonial remarks are not evidence and jury is so instructed); *United States v. Taxe,* 540 F.2d 961, 967-68 (9th Cir. 1976) (indecorous terms not improper provided there is some factual basis in the record), *cert. denied,* 429 U.S. 1040 (1977).

b. Requested Jury Instruction on Intent

Pangelinan argues that the court's instructions failed to adequately charge the jury on the element of intent. We disagree. The relevant instruction in this case included

the words "knowingly" and "intentionally." Although the district court did not further explain those terms, the jury nevertheless was instructed that the government must prove beyond a reasonable doubt that defendant acted with a specific intent. The district court did not err in refusing to give Pangelinan's requested instruction.

4. *Pangelinan's Sentence*

Pangelinan argues that he was sentenced to a greater term of imprisonment than were the Rasas, who pleaded guilty, simply because he exercised his right to trial. The district court, however, stated unequivocally that it was not punishing Pangelinan for going to trial.[2] In such instances, we have upheld the sentence imposed. *United States v. Carter,* 804 F.2d 508, 513 (9th Cir. 1986). Moreover, we have noted the propriety of crediting those who plead guilty. *Id.* at 514. We will not disturb the sentence imposed here.

AFFIRMED.

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[2]We do not, however, approve of the district court's comments regarding cooperation with the judicial system. Those comments are troublesome and have made this a very close issue on appeal.

Decision and Order of the
United States District Court
for the Northern Mariana Islands,
August 25, 1989

APPENDIX B

CRIMINAL CASE NO. 89-00006

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PONCIANO C. RASA,
OSCAR C. RASA, and
LEO S. PANGELINAN,
Defendants.

DECISION AND ORDER

THIS MATTER came before the Court on August 25, 1989, for hearing of defendants' motion to dismiss the indictment. The motion alleges that defendants have not been brought to trial within the seventy-day time limit required by the Speedy Trial Act, 18 U.S.C. § 3161 et. seq. All defendants joined in the motion.

The Act requires that a defendant be brought to trial "within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs." 18 U.S.C. § 3161(c)(1). Section 3161(h) provides certain exclusions from the seventy-day period.

Defendants first appeared before this Court on May 18, 1989. On that date, the government moved for and was granted a continuance of the trial date until September 6, 1989. Defendants specifically stated on the record that they had no objection to this request. Now they argue that such time period was not excludable under the Act because the Court made no finding "that the ends of justice

served by taking such action outweigh[ed] the best interest of the public and the defendant[s] in a speedy trial." 18 U.S.C. § 3161(h)(8)(A).

However, section 3161(h)(8)(A) goes on to say that the period of any continuance will not be excludable from the seventy-day period "unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial."

The following dialogue is a direct transcription of the first few minutes of the hearing held May 18, 1989:

> THE CLERK: Alex R. Munson, Judge, presiding.
>
> THE COURT: Good morning. Please be seated.
>
> THE CLERK: This is Criminal Case No. 89-00006, United States of America v. Ponciano C. Rasa, Oscar C. Rasa, Leo S. Pangelinan. The matter is on for arraignment this morning, and appearing for the plaintiff, U.S.A., is Richard W. Pierce, Assistant U.S. Attorney; for Oscar C. Rasa and Ponciano C. Rasa, attorney Howard C. Trapp; and Michael A. White for defendant Leo S. Pangelinan.
>
> THE COURT: There is a motion in this matter by the United States for a continuance pursuant to 18 U.S.C., Section 3161 H 8. I think we should address this motion first. Mr. Pierce?
>
> MR. TRAPP: Before Mr. Pierce argues, Your Honor, defendants have no objection.
>
> THE COURT: Fine.
>
> MR. PIERCE: I take it by Mr. White's silence that he's concurrent.
>
> MR. WHITE: That's correct, Your Honor. We have no objection.

> THE COURT: The Court agrees that neither the defense counsel nor the attorney for the government would have reasonable time necessary for effective preparation, taking into account the exercise and due diligence to prepare this case. Also it would be unreasonable to expect adequate preparation in the two days we have. I suggest that if we limit it to that date, a miscarriage of justice would result, and therefore coupled with the fact that there's no opposition from the defense counsel, the motion if granted.

Furthermore, the transcript reveals that counsel for defendants the Rasas then stated that July 17, 1989, was the earliest date he could try the case, and trial August 1, 1989, would be an even better date to begin for defendants the Rasas. TR. pp. 7-9. Then Mr. White, attorney for defendant Leo Pangelinan stated that he would be unavailable for the entire month of August. TR. p. 9. Finally, the Court, with the involvement and consent of all parties, set the trial date for September 6, 1989.

The cited portions of the transcript show that the entire colloquy between the Court and the attorneys for all parties entailed a weighing of the best interests of the public and the defendants in a speedy trial.

Section 3161(h)(8)(B) lists certain factors, among others, which the Court is to consider when determining whether to grant a continuance. Among these factors is whether the failure to grant a continuance "would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence."

As the transcript shows, the Court did in fact make the determination required and did state its belief that a miscarriage of justice would result if the continuance

were not granted. The Court stresses here that none of the defendants objected to continuing the trial, which in the absence of a continuance would have begun in two days.

The Court believes its decision to grant the continuance to meet the "ends of justice" was supported by contemporaneous findings made orally in the record of the case. Even if this belief is incorrect, the Ninth Circuit has held that dismissing an indictment for lack of contemporaneous findings would not be in keeping with the spirit of the Act or the goals Congress had in mind. *See, United States v. Bryant,* 726 F.2d 510, 511 (9th Cr. 1983), *quoting, United States v. Edwards,* 627 F.2d 460 (D.C. Cir.), *cert. denied,* 101 S. Ct. 211 (1980).

Defendants' motion is therefore DENIED.

Dated this 25th day of August, 1989.

ALEX R. MUNSON
Judge

Denial of Petition for
Rehearing from the United States
Court of Appeals, Ninth Circuit,
September 11, 1991

APPENDIX C

No. 90-10007
No. 90-10037
No. 90-10038
NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

PONCIANO CRUZ RASA,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

OSCAR CRUZ RASA,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

LEO S. PANGELINAN,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern Mariana Islands
Alex R. Munson, Chief Justice, Presiding

ORDER

D.C. No. CR-89-0006-1-ARM
D.C. No. CR-89-0006-2-ARM
D.C. No. CR-89-0006-3-ARM

Before: SKOPIL, BEEZER, and FERNANDEZ,
Circuit Judge

The panel has voted to deny the petition for rehearing. Judges Beezer and Fernandez have voted to reject the suggestion for rehearing en banc, and Judge Skopil recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Excerpt from Sentencing
Hearing on Leo Sablan Pangelinan on
December 22, 1989

APPENDIX D

SENTENCE

THE COURT: Mr. Pangelinan, you were found guilty by a jury of your peers of conspiracy to extort and extortion. I do think that there is a difference between the people that plead guilty and cooperate with the government and people that plead guilty and do not cooperate and people that plead not guilty and found guilty by a jury. I think the message has to go out to the community that not only are all of those people who are going to be punished, but that there's got to be a varying degree of punishment based upon the cooperation with the judicial system. I would have to assign your level of cooperaton the lowest among those three. That is pleading guilty and cooperating, pleading and not cooperating, and pleading not guilty and being found guilty, which is being guilty and not cooperating.

For those reasons, I'm going to order a term of imprisonment on Count 3, Conspiracy to Extortion of five years and a find of $5,000.00. On Count 4, a violation of sections 22 and 1951 18 U.S.C., Extortion, for five years and $5,000.00 fine. I will order that the sentences run concurrently, so that your total sentence will be five years. As Mr. Pierce pointed out, you will be eligible for parole in one-third of that time, which comes out to be less than even what your counsel recommended that range that the court sentence you.

In addition to the imprisonment and the fine, the court orders that restitution in the amount of $13,000.00 be paid to the government of the Commonwealth of the Northern Mariana Islands.

Finally, it is ordered that upon the defendant's release from custody he be placed on formal probation for five years.

I think the harm that was done here cannot be calculated. I don't know how many people are fearful in engaging business with the Commonwealth, but it's got to be considerable. For those reasons, I believe that the sentence is, quite frankly, on the lenient side. I will advise you that you have a right to appeal this court's decision as well as the jury's decision, and that you have 10 days in which to file an appeal. I will also advise you that if you cannot afford an attorney that one will be appointed to you for the appellate process. Let me just say that the fines that were imposed are due immediately, unless other arrangements are made, payable immediately to the Clerk of the Court, unless other arrangements are made through the probation department. Also, the restitution is, will be required to be paid prior to the probation has run. That, too, will be run through the probation department or coordinated through the probation department, and arrangements can be made to pay directly to the United States Attorney's office.

Mr. White, I ask if you have any questions at this time?

MR. WHITE: Not on the sentencing.

THE COURT: Mr. Pierce?

MR. PIERCE: May we both approach the bench, your Honor?

THE COURT: Yes, you may. Do you want this on the record?

MR. PIERCE: No.

(Bench conference had off the record.)

THE COURT: After bench conference and research in the Criminal Code, due to the nature of the convictions of the particular sections, probation is not one of the punishments that can be meted out if, unless there is a split

sentence in this matter. And split sentence is maximum of incarceration of six months with the remainder of imprisonment. For those reasons, I was in error when ordered that Mr. Pangelinan be on probation for five years after release. That part of the order is withdrawn and will not be a term of the sentence.

Mr. White, you wanted to be heard on another matter?

MR. WHITE: Your Honor, I fail to draw the distinction of the court's attempts to draw between, as the court termed that cooperating by pleading guilty and not cooperating by going to trial. Your Honor, the cases which we've cited to the court or which we're prepared to cite to the court state quite clearly that you cannot penalize the defendant by exercising his right to go to trial. That simply doesn't afford a constitutional basis for disparity in sentencing, and I'm going to ask the court to reconsider its sentence in that light.

THE COURT: That was not the intention of the court to punish Mr. Pangelinan for using his constitutional right of going to trial. The fact that he was found guilty of the two charges, he was sentenced to five years on each of those charges. My point was that a message should go to the community that people are going to be given some consideration for the cooperation that they show to the justice, the process of justice. I feel that Mr. Pangelinan by going to trial, and as Mr. Pierce pointed out and I adopt, and the jury found that he was not being candid, and the fact that he was not being truthful to the jury — for those reasons, he was found guilty by his actions. I just don't feel that he should have any leniency than to be sentenced for five years. The maximum sentence in this matter is 20 years, and five years is certainly not excessive in my mind. And certainly is not imposed for utilizing his constitutional rights to go to trial.

MR. WHITE: Once, again, your Honor, just let me get my citation in the record. *United States v. Madina Cervantes*, 690 F.2 at 715. It's a Ninth Circuit case from 1982. And *United States v. Harris*, 635 F.2 at 526, a Sixth Circuit case from 1980. Your Honor, I believe that the court sentence is because Mr. Pangelinan chose to go to trial, and not because he hasn't cooperated with the federal agents.

THE COURT: Well, your belief is mistaken, Mr. White. That is not the reason why the sentence was imposed such as it was. The record will speak for itself.

MR. WHITE: Thank you, your Honor.

THE COURT: Is there anything further in this matter?

MR. WHITE: Your Honor, at this time, the defendant moves for release pending appeal. And I would like to file a motion to that effect.

THE COURT: We need to clear up one other matter. Due to the fact that there is no probation period, restitution is going to have to be paid in this matter in accordance with some schedule worked out with the probation department.

Now, have you given a copy o[f] this motion to Mr. Pierce?

MR. WHITE: I have, your Honor; I've just given it to him. Perhaps, the court and Mr. Pierce wish to take a little time to consider it.

THE COURT: Mr. White, do you care to add anything to this at this time?

MR. WHITE: No; but may I be heard on the motion?

THE COURT: You may.

(NOTE: Defendant's Motion for Release Pending Appeal is excluded from this sentencing transcript as stated in the Notice of Transcript Order.)

(Court adjourned at 2:40 p.m., Friday, December 22, 1989.)

COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS } ss.
SAIPAN, MP

I, SANAE N. SHMULL, an Official Court Reporter for the United States District Court for the Northern Mariana Islands do hereby certify:

That the foregoing partial sentencing transcript on appeal in *United States of America v. Leo Sablan Pangelinan,* Criminal Case No. 89-00006 (U.S.C.A. Docket No. 90-10038) was taken down by me stenographically at the time and place herein named and thereafter reduced to typewriting by me at the request of defense attorney Michael A. White.

I further certify that I am not interested in the events of the matter.

IN WITNESS WHEREOF, I have subscribed my name and signature this 26th day of February, 1990.

SANAE N. SHMULL
Sanae N. Shmull
Official Court Reporter

Excerpts from
Transcript of Arraignment
in the United States District Court
of the Northern Mariana Islands,
May 18, 1989

APPENDIX E

Criminal Case
No. 89-00006

UNITED STATES DISTRICT COURT
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

UNITED STATES OF AMERICA,
Plaintiff,

VS.

PONCIANO C. RASA, OSCAR C. RASA,
LEO S. PANGELINAN,
Defendants.

TRANSCRIPT OF ARRAIGNMENT
May 18, 1989

Appearances:

For the United States:	Mr. Richard Pierce Assistant U.S. Attorney Horiguchi Building Garapan, Saipan, MP 96950
For defendants Rasa:	Mr. Howard Trapp 200 Saylor Building 139 Chalan Santo Papa Agana, Guam 96910
For defendant Pangelinan:	Mr. Michael White White, Novo-Gradac & Manglona P.O. Box 222 CHRB Saipan, MP 96950
Transcribed from electronic tape recording by:	Saipan Office Services P.O. Box 75 CHRB Saipan, MP 96950 (670) 234-7704/6449/6440

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SUSUPE, SAIPAN, MAY 16, 1989

CLERK: This is criminal case No. 89-00006, United States of America v. Ponciano C. Rasa, Oscar C. Rasa, Leo S. Pangelinan. The matter is on for arraignment this morning and appearing for the plaintiff, USA, is Richard W. Pierce, Assistant U.S. Attorney. For Oscar C. Rasa and Ponciano C. Rasa, Attorney Howard C. Trapp, and Michael A. White for defendant Leo S. Pangelinan.

THE COURT: There is a motion in this matter by the United States for a continuance pursuant to 18 USC Section 3161 H 8. I think we should address this one, this motion first. Mr. Pierce?

MR. TRAPP: Before Mr. Pierce argues, Your Honor, the defendants have no objection.

THE COURT: Okay, fine.

MR. PIERCE: I take it by Mr. White's silence that he is concurring?

MR. WHITE: That's correct, Your Honor. We have no objection.

THE COURT: The Court agrees that neither defense counsel nor the attorney for the government would have reasonable time necessary for effective preparation, taking into account the exercise in due diligence to prepare this case. Also, it would be unreasonable to expect adequate preparation in only the two days suggested. It would limit it and a miscarriage of justice might result, and therefore coupled with the fact that there is no opposition from the defense counsel, the motion is granted. Mr. Trapp, you are here today relative to representing your clients for arraignment and plea agreement, is that correct?

MR. TRAPP: Yes, for arraignment, Your Honor, yes.

THE COURT: Just arraignment?

MR. TRAPP: Did Your Honor say plea agreement?

THE COURT: To enter a plea.

MR. TRAPP: Oh, to enter a plea. Yes, Your Honor.

THE COURT: Mr. White?

MR. WHITE: That's all correct as to defendant Pangelinan, Your Honor.

THE COURT: Thank you. Is Mr. Ponciano C. Rasa in the court?

MR. PONCIANO RASA: Yes, Your Honor.

THE COURT: Would you please step forward? Mr. Rasa, will you be sworn in please?

(Mr. Ponciano C. Rasa is sworn.)

VOIR DIRE

THE COURT: We'll have to discuss two matters, namely the date for motions, trial dates, and possibly bail and I'll talk about the trial dates first.

MR. TRAPP: Counsel have discussed this, Your Honor, and if it's agreeable to the Court, counsel are all in agreement that we would go to trial on July the 17th.

MR. PIERCE: Your Honor, we're anticipating two weeks for the total package.

THE COURT: I beg your pardon Mr. Pierce?

MR. PIERCE: We're anticipating two weeks for the total package: jury selection, government's case, defendants' case.

THE COURT: That date is not going to be convenient for the Court. I had in mind — specifically, I won't be on

island on that date. Would you look at your calendars and see if July 25th would be good for all pretrial motions and motions in limine and chamber conference with the trial to begin on August 1st, which is a Tuesday?

MR. WHITE: Your Honor, I expect to be off island most of the month of August. I have had plans for nearly two years to be somewhere else for the first two weeks. My child is about to enter school in Hawaii and that's the last month I can move her.

MR. TRAPP: As to defendants Rasa, Your Honor, I'll be frank with you, those dates are even better for us than July 17th, but I do not wish to undermine Mr. White's position and I have no quarrel with his position and his conflict. The defendants would not object to it being later, defendants Rasa.

MR. WHITE: We could try this later.

THE COURT: Mr. Pierce? What is the earliest that you could be prepared, Mr. White and Mr. Trapp? The previous date that you gave me, July 17th, was that the earliest?

MR. TRAPP: That's about the earliest as a real practical matter, Your Honor.

MR. PIERCE: Your Honor, I would suggest June, and for the reason — except for the fact that I know of some witness problems I have, other commitments, but I guess everybody has that problem, but as far as the preparation, most of — this is a re-indictment for the most part and the discovery, and there were a substantial number of motions filed previously, and if it's possible, what about early July?

MR. TRAPP: Addressing that, Your Honor, when we said July 17th would be about the earliest for the Rasas,

it is true that I was counsel for the Rasas in the earlier case; however, I was substituted for other counsel fairly close to trial time and got involved in some procedural matters and in terms of my preparation at the time, never had really reached the preparation for trial stage, so I don't have that really behind me as having been counsel in the case before.

THE COURT: Keeping Mr. White's comments in mind, if we began on Thursday, July 20th and you anticipate two weeks, that would take us to about Thursday, August 3rd. Would that date interfere with your plans?

MR. WHITE: Your Honor, I expect to have to leave the island on July 30th or 31st. The 17th would be about the latest that we could start that I could assure the Court it wouldn't interfere with plans.

THE COURT: When do you anticipate being back Mr. White?

MR. WHITE: Your Honor, I expect to be back on the island, as I said, for a few days approximately August 14 or 15 and then I will have to leave again on August the 19th to get my daughter to school.

THE COURT: When would you be back for that trip?

MR. WHITE: The 29th or 30th of August. We could start September the 5th.

MR. TRAPP: Perhaps we could have the motions — or I'd make an inquiry, Your Honor, if it would be convenient for Mr. White to have the motions on those two days that he would be back.

MR. WHITE: Fine.

THE COURT: Mr. Pierce? Quite frankly June would be inconvenient for the Court at this late date.

MR. PIERCE: Your Honor, it appears to be one of those things where we're boxed in, and I think what we need to do is definitely set a date and no continuances, because arranging the witnesses here is going to be substantial.

THE COURT: Well, I can't say that we're not going to have any continuances because we can't see that emergencies might not arise, but certainly it's going to be a very compelling reason to continue if we set it for as late as we're talking about.

MR. PIERCE: Exactly, Your Honor, and as far as the date of the 5th, I think as everywhere I assume around here is a holiday, Labor Day, and the travel arrangements are sometimes difficult, so I would suggest starting on the Wednesday, the 6th, which would give an extra day.

THE COURT: How does that sound to everybody?

MR. TRAPP: No objection.

MR. WHITE: Fine with me, Your Honor.

THE COURT: Alright, the matter is set for 9:00 a.m. in this court. Mr. White, when you do anticipate being back so we can take care of motions?

MR. WHITE: As far as a hearing, Your Honor, Mr. Trapp's suggestion was a good one that we could hear them during the couple of days in August that I will be here and maybe we'll work back from that to a filing date, and we could hear motions some time during the week of the — perhaps even the morning of the 18th of August, if that's not too late.

MR. TRAPP: That's a Friday, I think.

THE COURT: Would that be convenient for all counsel?

MR. TRAPP: Yes, Your Honor.

MR. PIERCE: Your Honor, the only thing I have about the late day of that is that I don't know the nature of the motions to be filed here. If there is a motion to be filed that would have granted, essentially crippled the investigation of the case and I wanted the opportunity to appeal, perhaps some date earlier in July might be more satisfactory.

THE COURT: Mr. White, you're leaving you said the 30th of July?

MR. WHITE: Approximately, yes sir.

THE COURT: How does all counsel's schedule look for Friday, July 28th?

MR. TRAPP: No problem, Your Honor.

THE COURT: Alright.

MR. PIERCE: That would be a hearing date, I take it, Your Honor?

THE COURT: That's correct, a hearing for all pretrial motions and motions in limine and a trial conference that day. If there are no motions filed, which I doubt, all motions — if motions are filed, we'll hear those at 9:00 a.m.

MR. TRAPP: Could that also include as an omnibus hearing motions for bills of particular? I bring that up specifically, because unless the Court otherwise sets, I believe those motions have to be made much closer to the arraignment date.

THE COURT: Well, I think that if we all agree that on this date, or stipulate to it, that yes, if you'd like to bring that at that time.

MR. TRAPP: Very well.

THE COURT: Then we'll do that. In the event that there are no motions, that things get worked out, I still want to have a chamber conference, so be prepared to be here at that time, but I suspect there will be.

MR. TRAPP: So there would also then be a scheduled pretrial conference at that time, Your Honor?

THE COURT: Yes.

MR. PIERCE: I would prefer it if the Court would set a date for motions to be filed, which would give me the opportunity to do the necessary research.

MR. TRAPP: Doesn't the Court's rules provide for a sequence of filings and answering of motions? I don't recall offhand. I haven't looked at this Court's special rules yet. I know, for example, other district courts say you have to —

THE COURT: Ten or fourteen days in advance.

MR. TRAPP: Something like that. If we can just follow the rules, I think everybody would be —

THE COURT: The only thing was if we could accommodate everybody's schedule now, I think that might be easier than following the rules if it's inconvenient. I know that you're from off island, but if you'd just follow the local rules or if you'd rather set it up now for your own convenience —

MR. TRAPP: I have no preference. I was just trying to make a helpful suggestion.

MR. PIERCE: Actually, I was looking for a little bit more than ten days, but that's why I was suggesting it to the Court.

MR. WHITE: I think the local rules provide fourteen, Your Honor.

THE COURT: Fourteen. Alright, I think we ought to just sit by the local rules.

MR. PIERCE: Alright.

THE COURT: Alright, so the hearing date on this matter is set for 9:00 a.m. on July 30th —

MR. WHITE: Twenty-eighth, Your Honor.

THE COURT: I'm sorry, July 28, yes, and the hearing date as previously stated, which is September 6, 9:00 a.m.

MR. TRAPP: Thank you, Your Honor.

MR. PIERCE: Before Mr. Trapp leaves, perhaps I need to straighten out in my own mind though, as far as the speedy trial act, the Court has ruled and the defendants have agreed that because of the nature of the case that a continuance granted until September the 6th is necessary for the preparation and to the interest of justice.

MR. TRAPP: I think it's more fair to characterize that the defendants have met with the government's motion and that the defendants have no objection.

THE COURT: And the Court ruled and put on the record the reasons for the continuance. However, I appreciate your reminding me. I did not give a specific date, but the motion will be granted —

MR. PIERCE: I just want to be sure that between now and September 6 —

THE COURT: — up to September 6.

MR. TRAPP: The defendants have no objection to that, Your Honor.

THE COURT: Okay fine, that was my understanding. The Court calls Leo Sablan Pangelinan.

(Mr. Leo Sablan Pangelinan is sworn.)

VOIR DIRE

6th Amendment to the Constitution of the United States

APPENDIX F

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Excerpts from 18 U.S.C. § 3161

APPENDIX G

§ 3161. Time limits and exclusions

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c) The arraignment of a defendant charged in an information or indictment with the commission of an offense shall be held within ten days from the filing date (and making public) of the information or indictment, or from the date a defendant has been ordered held to answer and has appeared before a judicial officer of the court in which such charge is pending whichever date last occurs. Thereafter, where a plea of not guilty is entered, the trial of the defendant shall commence within sixty days from arraignment on the information or indictment at such place, within the district, as fixed by the appropriate judicial officer.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(A) delay resulting from an examination of the defendant, and hearing on, his mental competency, or physical incapacity;

(B) delay resulting from an examination of the defendant pursuant to section 2902 of title 28, United States Code [28 USCS § 2902];

(C) delay resulting from trials with respect to other charges against the defendant;

(D) delay resulting from interlocutory appeals;

(E) delay resulting from hearings on pretrial motions;

(F) delay resulting from proceedings relating to transfer from other districts under the Federal Rules of Criminal Procedure; and

(G) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3) (A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code [28 USCS § 2902].

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuance of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b) [this section] or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under paragraph (8)(A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

Title: 18 U.S.C. § 3162(a)(2)

APPENDIX H

§ 3162. Sanctions

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) [18 USCS § 3161(c)] as extended by section 3161(h) [18 USCS § 3161(h)], the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3) [18 USCS § 3161(h)(3)]. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosection on the administration of this chapter [18 USCS §§ 3161 et seq.] and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

Title: 28 U.S.C. § 1254(1)

APPENDIX I

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Title: Federal Rule of
Criminal Procedure
Rule 12(b)

APPENDIX J

Rule 12. Pleadings and Motions before Trial; Defenses and Objections

(b) *Pretrial motions.* Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or

(3) Motions to suppress evidence; or

(4) Requests for discovery under Rule 16; or

(5) Requests for a severance of charges or defendants under Rule 14.

Title: Commonwealth — Covenant to Establish — Northern Mariana Islands

APPENDIX K

"Covenant To Establish a Commonwealth of the Northern Mariana Islands in Political Union With the United States of America

"Whereas, the Charter of the United Nations and the Trusteeship Agreement between the Security Council of the United Nations and the United States of America guarantee to the people of the Northern Mariana Islands the right freely to express their wishes for self-government or independence; and

"Whereas, the United States supports the desire of the people of the Northern Mariana Islands to exercise their inalienable right of self-determination; and

"Whereas, the people of the Northern Mariana Islands and the people of the United States share the goals and values found in the American system of government based upon the principles of government by the consent of the governed, individual freedom and democracy; and

"Whereas, for over twenty years, the people of the Northern Mariana Islands, through public petition and referendum, have clearly expressed their desire for political union with the United States;

"Now, therefore, the Marianas Political Status Commission, being the duly appointed representative of the people of the Northern Mariana Islands, and the Personal Representative of the President of the United States have entered into this Covenant in order to establish a self-governing commonwealth for the Northern Mariana Islands within the American political system and to define the future relationship between the Northern Mariana Islands and the United States. This Covenant will be mutually binding when it is approved by the United States, by the Mariana Islands District Legislature and by the people of the Northern Mariana Islands in a

plebiscite, constituting on their part a sovereign act of self-determination.

"ARTICLE I

"POLITICAL RELATIONSHIP

"SECTION 101. The Northern Mariana Islands upon termination of the Trusteeship Agreement will become a self-governing commonwealth to be known as the 'Commonwealth of the Northern Mariana Islands', in political union with and under the sovereignty of the United States of America.

"SECTION 102. The relations between the Northern Mariana Islands and the United States will be governed by this Covenant which, together with those provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands, will be the supreme law of the Northern Mariana Islands.

"SECTION 103. The people of the Northern Mariana Islands will have the right of local self-government and will govern themselves with respect to internal affairs in accordance with a Constitution of their own adoption.

"SECTION 104. The United States will have complete responsibility for and authority with respect to matters relating to foreign affairs and defense affecting the Northern Mariana Islands.

"SECTION 105. The United States may enact legislation in accordance with its constitutional processes which will be applicable to the Northern Mariana Islands, but if such legislation cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named therein for it to become effective in the Northern Mariana Islands. In order to respect the right

of self-government guaranteed by this Covenant the United States agrees to limit the exercise of that authority so that the fundamental provisions of this Covenant, namely Articles I, II and III and Sections 501 and 805, may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Islands.

"ARTICLE V

"APPLICABILITY OF LAWS

"SECTION 501. (a) To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States: Article I, Section 9, Clauses 2, 3, and 8; Article I, Section 10, Clauses 1 and 3; Article IV, Section 1 and Section 2, Clauses 1 and 2; Amendments 1 through 9, inclusive; Amendment 13; Amendment 14, Section 1; Amendment 15; Amendment 19; and Amendment 26; provided, however, that neither trial by jury nor indictment by grant jury shall be required in any civil action or criminal prosecution based on local law, except where required by local law. Other provisions of or amendments to the Constitution of the United States, which do not apply of their own force within the Northern Mariana Islands, will be applicable within the Northern Mariana Islands only with approval of the Government of the Northern Mariana Islands and of the Government of the United States.

"(b) The applicability of certain provisions of the Constitution of the United States to the Northern Mariana Islands will be without prejudice to the validity of and the power of the Congress of the United States to consent to

Sections 203, 506 and 805 and the proviso in Subsection (a) of this Section.

"SECTION 502. (a) The following laws of the United States in existence on the effective date of this Section and subsequent amendments to such laws will apply to the Northern Mariana Islands, except as otherwise provided in this Covenant:

"(1) those laws which provide federal services and financial assistance programs and the federal banking laws as they apply to Guam; Section 228 of Title II and Title XVI of the Social Security Act as it applies to the several States; the Public Health Service Act as it applies to the Virgin Islands; and the Micronesian Claims Act as it applies to the Trust Territory of the Pacific Islands;

"(2) those laws not described in paragraph (1) which are applicable to Guam and which are of general application to the several States as they are applicable to the several States; and

"(3) those laws not described in paragraph (1) or (2) which are applicable to the Trust Territory of the Pacific Islands, but not their subsequent amendments unless specifically made applicable to the Northern Mariana Islands, as they apply to the Trust Territory of the Pacific Islands until termination of the Trusteeship Agreement, and will thereafter be inapplicable.

"(b) The laws of the United States regarding coastal shipments and the conditions of employment, including the wages and hours of employees, will apply to the activities of the United States Government and its contractors in the Northern Mariana Islands.

"SECTION 503. The following laws of the United States, presently inapplicable to the Trust Territory of the Pacific Islands, will not apply to the Northern Mariana Islands except in the manner and to the extent made applicable to them by the Congress by law after termination of the Trusteeship Agreement:

"(a) except as otherwise provided in Section 506, the immigration and naturalization laws of the United States;

"(b) except as otherwise provided in Subsection (b) of Section 502, the coastwise laws of the United States and any prohibition in the laws of the United States against foreign vessels landing fish or unfinished fish products in the United States; and

"(c) the minimum wage provisions of Section 6, Act of June 25, 1938, 52 Stat. 1062, as amended.

"SECTION 505. The laws of the Trust Territory of the Pacific Islands, of the Mariana Islands District and its local municipalities, and all other Executive and District orders of a local nature applicable to the Northern Mariana Islands on the effective date of this Section and not inconsistent with this Covenant or with those provisions of the Constitution, treaties or laws of the United States applicable to the Northern Mariana Islands will remain in force and effect until and unless altered by the Government of the Northern Mariana Islands.

"SECTION 506. (a) Notwithstanding the provisions of Subsection 503(a), upon the effective date of this Section the Northern Mariana Islands will be deemed to be a part of the United States under the Immigration and Nationality Act, as amended for the following purposes only, and the said Act will apply to the Northern Mariana Islands

to the extent indicated in each of the following Subsections of this Section.

"(b) With respect to children born abroad to United States citizen or non-citizen national parents permanently residing in the Northern Mariana Islands the provisions of Sections 301 and 308 of the said Act will apply.

"(c) With respect to aliens who are 'immediate relatives' (as defined in Subsection 201(b) of the said Act) of United States citizens who are permanently residing in the Northern Mariana Islands all the provisions of the said Act will apply, commencing when a claim is made to entitlement to 'immediate relative' status. A person who is certified by the Government of the Northern Mariana Islands both to have been a lawful permanent resident of the Northern Mariana Islands and to have had the 'immediate relative' relationship denoted herein on the effective date of this Section will be presumed to have been admitted to the United States for lawful permanent residence as of that date without the requirement of any of the usual procedures set forth in the said Act. For the purpose of the requirements of judicial naturalization, the Northern Mariana Islands will be deemed to constitute a State as defined in Subsection 101(a) paragraph (36) of the said Act. The Courts of record of the Northern Mariana Islands and the District Court for the Northern Mariana Islands will be included among the courts specified in Subsection 310(a) of the said Act and will have jurisdiction to naturalize persons who become eligible under this Section and who reside within their respective jurisdictions.

"(d) With respect to persons who will become citizens or nationals of the United States under Article III of this

Covenant or under this Section the loss of nationality provisions of the said Act will apply.

"ARTICLE IX

NORTHERN MARIANA ISLANDS REPRESENTATIVE AND CONSULTATION

"SECTION 901. The Constitution or laws of the Northern Mariana Islands may provide for the appointment or election of a Resident Representative to the United States, whose term of office will be two years, unless otherwise determined by local law, and who will be entitled to receive official recognition as such Representative by all of the departments and agencies of the Government of the United States upon presentation through the Department of State of a certificate of selection from the Governor. The Representative must be a citizen and resident of the Northern Mariana Islands, at least twenty-five years of age, and, after termination of the Trusteeship Agreement, a citizen of the United States.

"SECTION 902. The Government of the United States and the Government of the Northern Mariana Islands will consult regularly on all matters affecting the relationship between them. At the request of either Government, and not less frequently than every ten years, the President of the United States and the Governor of the Northern Mariana Islands will designate special representatives to meet and to consider in good faith such issues affecting the relationship between the Northern Mariana Islands and the United States as may be designated by either Government and to make a report and recommendations with respect thereto. Special representatives will be appointed in any event to consider and to make recommendations regarding future multi-year financial assistance to the Northern Mariana Islands pursuant to Section 701,

to meet at least one year prior to the expiration of every period of such financial assistance.

"SECTION 903. Nothing herein shall prevent the presentation of cases or controversies arising under this Covenant to courts established by the Constitution or laws of the United States. It is intended that any such cases or controversies will be justiciable in such courts and that the undertakings by the Government of the United States and by the Government of the Northern Mariana Islands provided for in this Covenant will be enforceable in such courts.

"SECTION 904. (a) The Government of the United States will give sympathetic consideration to the views of the Government of the Northern Mariana Islands on international matters directly affecting the Northern Mariana Islands and will provide opportunities for the effective presentation of such views to no less extent than such opportunities are provided to any other territory or possession under comparable circumstances.

"(b) The United States will assist and facilitate the establishment by the Northern Mariana Islands of offices in the United States and abroad to promote local tourism and other economic or cultural interests of the Northern Mariana Islands.

"(c) On its request the Nothern Mariana Islands may participate in regional and other international organizations concerned with social, economic, educational, scientific, technical and cultural matters when similar participation is authorized for any other territory or possession of the United States under comparable circumstances.

"ARTICLE X

"APPROVAL, EFFECTIVE DATES, AND DEFINITIONS

"SECTION 1001. (a) This Covenant will be submitted to the Mariana Islands District Legislature for its approval. After its approval by the Mariana Islands District Legislature, this Covenant will be submitted to the people of the Northern Mariana Islands for approval in a plebiscite to be called by the United States. Only persons who are domiciled exclusively in the Northern Mariana Islands and who meet such other qualifications, including timely registration, as are promulgated by the United States as administering authority will be eligible to vote in the plebiscite. Approval must be by a majority of at least 55% of the valid votes cast in the plebiscite. The results of the plebiscite will be certified to the President of the United States.

"(b) This Covenant will be approved by the United States in accordance with its constitutional processes and will thereupon become law.

"SECTION 1002. The President of the United States will issue a proclamation announcing the termination of the Trusteeship Agreement, or the date on which the Trusteeship Agreement will terminate, and the establishment of the Commonwealth in accordance with this Covenant. Any determination by the President that the Trusteeship Agreement has been terminated or will be terminated on a day certain will be final and will not be subject to review by any authority, judicial or otherwise, of the Trust Territory of the Pacific Islands, the Northern Mariana Islands or the United States.

"SECTION 1003. The provisions of this Covenant will become effective as follows, unless otherwise specifically provided:

"(a) Sections 105, 201-203, 503, 504, 606,, 801, 903 and Article X will become effective on approval of this Covenant;

"(b) Sections 102, 103, 204, 304, Article IV, Sections 501, 502, 505, 601-605, 607, Article VII, Sections 802-805, 901 and 902 will become effective on a date to be determined and proclaimed by the President of the United States which will be not more than 180 days after this Covenant and the Constitution of the Northern Mariana Islands have both been approved; and

"(c) The remainder of this Covenant will become effective upon the termination of the Trusteeship Agreement and the establishment of the Commonwealth of the Northern Mariana Islands.

"SECTION 1004. (a) The application of any provision of the Constitution or laws of the United States which would otherwise apply to the Northern Mariana Islands may be suspended until termination of the Trusteeship Agreement if the President finds and declares that the application of such provision prior to termination would be inconsistent with the Trusteeship Agreement.

"(b) The Constitution of the Northern Mariana Islands will become effective in accordance with its terms on the same day that the provisions of this Covenant specified in Subsection 1003(b) become effective, provided that if the President finds and declares that the effectiveness of any provision of the Constitution of the Northern Mariana Islands prior to termination of the Trusteeship Agreement would be inconsistent with the Trusteeship Agreement such provision will be ineffective

until termination of the Trusteeship Agreement. Upon the establishment of the Commonwealth of the Northern Mariana Islands the Constitution will become effective in its entirety in accordance with its terms as the Constitution of the Commonwealth of the Northern Mariana Islands.

"SECTION 1005. As used in this Covenant:

"(a) 'Trusteeship Agreement' means the Trusteeship Agreement for the former Japanese Mandated Islands concluded between the Security Council of the United Nations and the United States of America, which entered into force on July 18, 1947;

"(b) 'Northern Mariana Islands' means the area now known as the Mariana Islands District of the Trust Territory of the Pacific Islands, which lies within the area north of 14° north latitude, south of 21° north latitude, west of 150° east longitude and east of 144° east longitude;

"(c) 'Government of the Northern Mariana Islands' includes, as appropriate, the Government of the Mariana Islands District of the Trust Territory of the Pacific Islands at the time this Covenant is signed, its agencies and instrumentalities, and its successors, including the Government of the Commonwealth of the Northern Mariana Islands;

"(d) 'Territory or possession' with respect to the United States includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam and American Samoa;

"(e) 'Domicile' means that place where a person maintains a residence with the intention of continuing such residence for an unlimited or indefinite period, and to which such person has the intention of returning whenever he is absent, even for an extended period.

"Signed at Saipan, Mariana Islands on the fifteenth day of February, 1975.

"For the people of the Northern Mariana Islands:

EDWARD DLG. PANGELINAN,
Chairman, Marianas Political Status Commission.
VICENTE N. SANTOS,
Vice Chairman, Marianas Political Status Commission.

"For the United States of America:

Ambassador F. HAYDN WILLIAMS,
Personal Representative of the President of the United States.

"Members of the Marianas Political Status Commission:

JUAN LG. CABRERA.
VICENTE T. CAMACHO.
JOSE R. CRUZ.
BERNARD V. HOFSCHNEIDER.
BENJAMIN T. MANGLONA.
DANIEL T. MUNA.
DR. FRANCISCO T. PALACIOS.
JOAQUIN I. PANGELINAN.
MANUEL A. SABLAN.
JOANNES B. TAIMANAO.
PEDRO A. TENORIO."

SEC. 2. It is the sense of the Congress that pursuant to section 9002 of the foregoing Covenant, and in any case within ten years from the date of the enactment of this resolution, the President of the United States should request, on behalf of the United States, the designation of special representatives to meet and to consider in good faith such issues affecting the relationship between the

Northern Mariana Islands and the United States as may be designated by either Government and to make a report and recommendations with respect thereto.

Approved March 24, 1976.

18 U.S.C. § 1951

APPENDIX L

§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15 [15 USCS § 17], sec-

tions 52, 101-105, 151-166 of Title 29 or sections 151-188 of Title 45 [45 USCS §§ 151-188].
(June 25, 1948, ch 645, § 1, 62 Stat. 793.)

18 U.S.C. § 1343

APPENDIX M

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Federal Rules of Criminal Procedure
11(a)(2).

APPENDIX N

Rule 11. Pleas

(a) Alternatives. (1) *In general.* A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) *Conditional pleas.* With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal he shall be allowed to withdraw the plea.

Indictment by the United States District Court
for the Northern Mariana Islands
on April 21, 1989.

APPENDIX O

Criminal Case
No. 89-00006

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PONCIANO CRUZ RASA, OSCAR C. RASA,
and LEO SABLAN PANGELINAN,
Defendants.

INDICTMENT

COUNT ONE:	18 U.S.C. §§ 2 and 1343 [WIRE FRAUD]
COUNT TWO:	18 U.S.C. §§ 2 and 1343
COUNT THREE:	18 U.S.C. §§ 2 and 1951
COUNT FOUR:	18 U.S.C. §§ 2 and 1951

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Attorneys for United States of America

COUNT ONE

THE GRAND JURY CHARGES:

(1) From on or about December, 1983, until at least August, 1984 on Saipan in the Northern Mariana Islands within the jurisdiction of the District Court of the Northern Mariana Islands and other places, the defendants herein,

PONCIANO CRUZ RASA,
OSCAR CRUZ RASA,
LEO SABLAN PANELINAN,

aided and abetted by each other and by others not indicted herein, that is Sumitomo Construction Company, Ltd. ("Sumitomo Construction") and Mariano Reyes Bermudes, did willfully and knowingly devise a scheme to defraud the Commonwealth of the Northern Mariana Islands ("CNMI") and Turner International (Micronesia), Inc. ("Turner International") of money and property — that is a sub-contract to construct a portion of the Commonwealth Health Center and payments under the subcontract. The scheme to defraud would be conducted by deceit, by unreported kickbacks, by dishonesty, and by the sale of government property for private gain.

Background Of Scheme to Defraud

(2) The scheme had its roots from at least 1982 when defendant PONCIANO CRUZ RASA, a senator in the CNMI, had real or apparent influence on some government building projects in the CNMI. He also had political ambitions. Sumitomo Construction and a related company Sumitomo Corporation (both Japanese companies) wanted to continue and to increase their construction business in the Northern Mariana Islands.

(3) LEO SABLAN PANGELINAN worked for the CNMI Senate as a consultant to the Senate Committee on Resources, Development and Programs of which PONCIANO CRUZ RASA was charman. OSCAR CRUZ RASA served as the fundraiser and leader for PONCIANO CRUZ RASA's political ambitions.

(4) In April, 1983, PONCIANO CRUZ RASA and OSCAR CRUZ RASA with the CNMI Senate attorney, James A. Doerty, went to Japan and induced Sumitomo Construction and Sumitomo Corporation to give $165,000.00 to them for PONCIANO CRUZ RASA's assistance in aiding or at least not hurting the Sumitomo businesses on Saipan. At that time, Sumitomo Corporation with Sumitomo Construction had a contract for $16,500,000.00 with the Mariana Islands Housing Authority to build houses under the "As Gonno" Koblerville project. the $165,000.00 was computed as 1% of the "As Gonno" contract price. Through one means or another, the $165,000.00 was delivered to PONCIANO CRUZ RASA and OSCAR CRUZ RASA. PONCIANO CRUZ RASA and OSCAR CRUZ RASA also asked the Sumitomo companies for money equal to 1% of all future Sumitomo contracts on Saipan.

(5) In 1983, Mariano Reyes Bermudes, Chief of the CNMI Health Planning and Development Agency, had access to plans to build a new hospital on Saipan, the Commonwealth Health Center. The hospital was to be built primarily with funds from the United States government paid to the CNMI government. Mariano Reyes Bermudes with LEO SABLAN PANGELINAN and Tadashi Kinumura formed a corporation to assist Japanese corporations who might be interested in bidding on the hospital project.

(6) From his official position, Mariano Reyes Bermudes obtained a Turner International report on the planned construction phases of the hospital and cost projections for building the hospital, which was not available to the public. He and LEO SABLAN PANGELINAN sold the report to Tadashi Kinumura for $3,000.00 in cash.

(7) Shortly thereafter, Mariano Reyes Bermudes, LEO SABLAN PANGELINAN, and Tadashi Kinumura met with respresentatives of the Mitsui Construction Company, Ltd. (Mitsui) to discuss Mitsui's bidding on the hospital project.

(8) In early 1983, Mariano Reyes Bermudes obtained from the CNMI Senate attorney, James A. Doerty, a copy of a confidential, proposed contract with cost projections between Turner International and the CNMI for a onstruction management agreement on the hospital. Mariano Reyes Bermudes and LEO SABLAN PANGELINAN then sold a copy of the proposed contract to Tadashi Kinumura for $10,000.00 in cash.

(9) In approximately May, 1983, PONCIANO CRUZ RASA, OSCAR CRUZ RASA, LEO SABLAN PANGELINAN, and Mariano Reyes Bermudes agreed to sell to a Singapore group for $6,000.00, PONCIANO CRUZ RASA's recommendation to Sumitomo Construction to sub-contract work on "As Gonno" to the Singaporeans. Afterwards, Mariano Reyes Bermudes and LEO SABLAN PANGELINAN delivered the recommendation typed on CNMI Senate stationery to the Singaporeans and received $6,000.00 in cash which was split among PONCIANO CRUZ RASA, OSCAR CRUZ RASA, LEO SABLAN PANGELINAN, and Mariano Reyes Bermudes.

(10) In late 1983, CNMI announed that the CNMI and Turner International would accept new bids for the sub-contract construction work on the new hospital. The first bidding process for sub-contracts in August, 1983, had been disallowed.

Scheme to Defraud the CNMI

(11) In December, 1983, and thereafter at least through April, 1984, the exact date unknown, PONCIANO CRUZ RASA, OSCAR CRUZ RASA, LEO SABLAN PANGELINAN and Mariano Reyes Bermudes induced Sumitomo Construction to give them money in exchange for assistance in bidding on subcontracts on the hospital project. The four wanted kickbacks of 1% of whatever contract Sumitomo Construction obtained in bidding on the hospital project.

(12) LEO SABLAN PANGELINAN and Mariano Reyes Bermudes delivered to Masahiro Ishii of Sumitomo Construction a copy of Turner International's cost proposal on the hospital project, which proposals were not available to the public. Mariano Reyes Bermudes had the cost proposals by virtue of his position as Chief of CNMI Health Planning and Development Agency.

(13) Sumitomo Construction obtained the document to prepare and submit its bid on the hospital project. In the bid, Sumitomo Construction certified that the bid not result from any collusion.

(14) Sumitomo Construction gave LEO SABLAN PANGELINAN $3,000.00 for the document.

(15) In March, 1984, the CNMI and Turner International awarded Sumitomo Construction a contract for $4,408,000.00 on a portion of the hospital project. One percent of that was approximately $44,000.00.

(16) In March, 1984, PONCIANO CRUZ RASA and OSCAR CRUZ RASA again demanded money from Sumitomo Construction.

(17) On April 24, 1984, LEO SABLAN PANGELINAN received a check for $20,000.00 from Sumitomo Construction, which he cashed and divided with Mariano Reyes Bermudes.

(18) To cover up the kickback of $20,000.00, a fake consulting agreement was prepared on or about April 24, 1984, but was back dated to January 5, 1984.

(19) On or about March, 1984, Sumitomo Construction made a kickback of $10,000 in cash to OSCAR CRUZ RASA and PONCIANO CRUZ RASA.

(19) On April 27, 1984, Sumitomo Construction made a kickback of $14,000.00 by check to OSCAR CRUZ RASA and PONCIANO CRUZ RASA. The total kickback of $24,000.00 to OSCAR CRUZ RASA and PONCIANO CRUZ RASA was hidden by a fake invoice for services allegedly delivered by the Commonwealth Examiner of which OSCAR CRUZ RASA was the owner.

(21) On or about July 9, 1984, Sumitomo Construction received a payment of $62,676.00 on the hospital project sub-contract.

(22) On or about August 13, 1984, Sumitomo Construction received a payment of $80,397.00 on the hospital project sub-contract.

Use of Interstate and Foreign Commerce Facilities

(23) On or about July 6, 1984, in execution of the scheme recited above, the defendants and Sumitomo Construction in the District of Northern Mariana Islands caused to be transmitted by wire and radio transmission

between the state of New York and the CNMI certain signs, signals, and sounds, that is, directions for the payment of money due Sumitomo Construction under the sub-contract on the hospital project, in violation of Title 18, United States Code, Sections 2 and 1343.

COUNT TWO

THE GRAND JURY CHARGES:

(1) The Grand Jury realleges and incorporates by reference paragraphs 1 through 22 of Count One.

(2) On or about August 13, 1984, in execution of the scheme recited above, the defendants and Sumitomo Construction in the District of Northern Mariana Islands caused to be transmitted by wire and radio transmission between the state of New York and the CNMI certain signs, signals, and sounds, that is, directions for the payment of money due Sumitomo Construction under the sub-contract on the hospital project, in violation of Title 18, United States Code, Sections 2 and 1343.

COUNT THREE

THE GRAND JURY CHARGES:

At all times material herein,

1. PONCIANO CRUZ RASA, defendant herein, was in the Senate for the Commonwealth of the Northern Mariana Islands ("CNMI"), and served as Chairman of the Senate's Committee on Resources, Development and Programs. In 1984, PONCIANO CRUZ RASA became president of the Senate.

2. LEO SABLAN PANGELINAN, defendant herein, was an employee of the Commonwealth of the Northern Mariana Islands Senate and, as such, was assigned to PONCIANO CRUZ RASA as his aide and served as a consultant to the Senate's Committee on Resources, Development and Programs.

3. OSCAR CRUZ RASA, defendant herein, is a brother of PONCIANO CRUZ RASA, and at all times material herein served PONCIANO CRUZ RASA as his campaign manager and fundraiser.

4. Mariano Reyes Bermudes, an unindicted co-conspirator, served the Commonwealth of the Northern Mariana Islands as Chief Health Planner of the Commonwealth Health Planning and Development Agency.

5. Sumitomo Construction Company, Ltd. ("Sumitomo Construction"), was a Japanese based company that had a construction business on Saipan and elsewhere. Jun Tamura, Yoshinobu Masamoto, and Masahiro Ishii were employees of Sumitomo Construction. Masahiro Ishii served Sumitomo Construction as project manager assigned to Saipan. Jun Tamura was Senior Managing Director of Sumitomo Construction.

6. Sumitomo Corporation, a Japanese based company, had a contract with the Mariana Islands Housing Authority to construct housing for the "As Gonno" Koblerville project. This contract required a substantial investment by Sumitomo Corporation on Saipan. Sumitomo Corporation in turn contracted with Sumitomo Construction to perform the "As Gonno" project contract. Akira Nakagawa, Koji Morio and Takeo Sigawa were employees of Sumitomo Corporation.

7. Shigenori Hiraga, a/k/a Chico Hiraga, an unindicted co-conspirator, was a Japanese businessman who served CDC Japan, Ltd. as its President. Shigenori Hiraga had an agreement with Sumitomo Corporation to find business for it on Saipan, for which he would receive a commission. He acted as a middle man for the conspiracy.

The Criminal Conspiracy

8. From on or about December, 1982, the exact date being unknown to the Grand Jury to and including April, 1984, within the District of the Northern Mariana Islands and elsewhere, the defendants, herein,

PONCIANO CRUZ RASA,
OSCAR CRUZ RASA,
LEO SABLAN PANGELINAN,

knowingly and willfully conspired and agreed together and with other persons, not indicted herein, including Mariano Reyes Bermudes and Shigenori Hiraga, to extort money from Sumitomo Corporation and Sumitomo Construction, which extortion would obstruct, delay, and affect commerce and the movement of articles in commerce, within the CNMI and Japan and other points outside the CNMI.

Objects of the Conspiracy

9. The objects of the conspiracy were:

(a) For PONCIANO CRUZ RASA, OSCAR CRUZ RASA, LEO SABLAN PANGELINAN, and others to have Sumitomo Corporation and Sumitomo Construction consent to give the money not due under law either to PONCIANO CRUZ RASA, OSCAR CRUZ RASA, LEO SABLAN PANGELINAN, and others, or to the government of the CNMI;

(b) To induce the consent and payment of money by the wrongful use of fear of economic loss to Sumitomo Corporation and Sumitomo Construction on the "As Gonno" project and other Sumitomo business interest in the Northern Mariana Islands; and

(c) To induce the consent and payment of money under color of official right that is by the actual, apparent, and potential authority and influence of PONCIANO CRUZ RASA's official position and future position in the CNMI government, and the authority and influence of Mario Reyes Bermudes' official position in the CNMI government.

Terms Of The Conspiracy

10. On or about December, 1982, if not sooner, PONCIANO CRUZ RASA enlisted the assistance of co-conspirator Shigenori Hiraga to obtain large amounts of money from Sumitomo Corporation and Sumitomo Construction. At that time, Sumitomo Corporation and Sumitomo Construction already had problems with the "As Gonno" project in that the CNMI government had not provided for money to pay for certain infrastructure improvements on the project, and had not exempted

Sumitomo Corporation and Sumitomo Construction from certain taxes as had been expected.

11. On or about December, 1982, PONCIANO CRUZ RASA asked for money from Jun Tamura of Sumitomo Construction and said that he would help Sumitomo Construction in the "As Gonno" housing project.

12. From or about December, 1982, until April, 1983, Shigenori Hiraga obtained at least $23,000.00 from Sumitomo Corporation and Sumitomo Construction that he in turn gave to PONCIANO CRUZ RASA.

13. On or about April 22, 1983, defendants PONCIANO CRUZ RASA, OSCAR CRUZ RASA, assisted by CNMI Senate counsel James A. Doerty, met in Sumitomo Corporation building in Tokyo, Japan, with Jun Tamura, Shigenori Hiraga, Takeo Sigawa, Akira Nakagawa and Koji Morio and demanded from $200,000.00 to $300,000.00 from Sumitomo Corporation and Sumitomo Construction in return for defendant PONCIANO CRUZ RASA's assistance on the "As Gonno" housing project and other Sumitomo business interest on Saipan.

14. On or about April 22, 1983, PONCIANO CRUZ RASA and OSCAR CRUZ RASA agreed to accept one percent (1%) of the $16,500,000.00 "As Gonno" contract awarded to Sumitomo Corporation. That amount was $165,000.00

15. On or about May, 1983, Sumitomo Construction wire transferred $55,000.00 into Shigenori Hiraga's bank account in Yokohama, Japan, which money he in turn brought to Saipan and paid to PONCIANO CRUZ RASA and OSCAR CRUZ RASA. After that, Shigenori Hiraga and Mashiro Ishii made additional payments of money to PONCIANO CRUZ RASA and OSCAR CRUZ RASA, to make up the $165,000.00.

16. On or about in December of 1983, defendant OSCAR CRUZ RASA, PONCIANO CRUZ RASA, LEO SABLAN PANGELINAN and Mariano Reyes Bermudes met with Masahiro Ishii on Saipan and demanded a one percent (1%) commission on all proceeds received by Sumitomo Construction from a subcontract on the CHC hospital construction project, should the company be awarded the subcontract.

17. On or about in December, 1983, defendants LEO SABLAN PANGELINAN and Mariano Reyes Bermudes offered and then gave Masahiro Ishii a copy of Turner International's costs proposals on the CHC hospital project, which proposals were available to Mariano Reyes Bermudes because of his official position in the CNMI government.

18. On or about in December 22, 1983, Masahiro Ishii paid LEO SABLAN PANGELINAN $3,000.00 cash.

19. On or about January, 1984, Sumitomo Construction bid for and later obtained a contract for a portion of the CHC hospital project for $4,408.00.

20. On or about March, 1984, PONCIANO CRUZ RASA and OSCAR CRUZ RASA demanded money from Sumitomo Construction under the threat of harming Sumitomo Construction's business on Saipan.

21. On or about April 24, 1984, LEO SABLAN PANGELINAN prepared or had prepared a document entitled "Consulting Agreement" as a pretext for the acceptance of $20,000.00 from Sumitomo Construction and back dated the document to January 5, 1984.

22. On or about March and April, 1984, OSCAR CRUZ RASA received $10,000.00 in cash and $14,000.00 by check from Sumitomo Construction. This money was to be shared with PONCIANO CRUZ RASA.

23. On or about April 27, 1984, OSCAR CRUZ RASA, to hide the reason for the payment of $24,000.00, had prepared a fake invoice for services allegedly provided by the Commonwealth Examiner of which OSCAR CRUZ RASA was the owner.

All of the above is a violation of 18 U.S.C. §§ 2 and 1951.

COUNT FOUR

THE GRAND JURY CHARGES:

1. the grand jury realleges and incorporates by reference paragraphs 1 through 6 and paragraphs 16 through 23 of COUNT THREE of this indictment.

2. From on or about December 1, 1983, until on about April 27, 1984, within the District of the Northern Mariana Islands and elsewhere, the defendants herein,

PONCIANO CRUZ RASA,
OSCAR CRUZ RASA,
LEA SABLAN PANGELINAN,

aided and abetted by each other and by Mariano Reyes Bermudes, not indicted herein, did knowingly and intentionally extort $47,000.00 from Sumitomo Construction Company, Ltd., ("Sumitomo Construction"), which extortion did obstruct, delay, and affect commerce and the movements of articles in commerce within the Commonwealth of the Northern Mariana Islands ("CNMI") and between the CNMI and Japan and other points outside the CNMI;

2. That is, the defendants

PONCIANO CRUZ RASA,
OSCAR CRUZ RASA,
LEO SABLAN PANGELINAN,

with Mariano Reyes Bermudes, not indicted herein, did knowingly and intentionally obtain money not lawfully due them or the CNMI government, from Sumitomo Construction, with its consent induced 1) by the wrongful use of actual and threatened fear of economic loss to Sumitomo Construction's business interest in Saipan, and 2) under the real or apparent authority of PONCIANO

CRUZ RASA's and Mariano Reyes Bermudes' official positions in the CNMI government.

All of the above is a violation of 18 U.S.C. §§ 2 and 1951.

DATED this 21st day of April, 1989.

Felipe T. Fehelan,
Deputy Foreman

K. WILLIAM O'CONNOR
United States Attorney
For the Districts of Guam
and the Northern Mariana
Islands

By _____
RICHARD W. PIERCE
Assistant United
States Attorney

Supreme Court, U.S.
FILED
MAR 9 1992
OFFICE OF THE CLERK

No. 91-758

In the Supreme Court of the United States

OCTOBER TERM, 1991

PONCIANO CRUZ RASA, OSCAR CRUZ RASA, AND LEO SABLAN PANGELINAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the federal wire fraud statute and the Hobbs Act apply to the Commonwealth of the Northern Mariana Islands.

2. Whether the length of the continuance granted on the government's unopposed motion violated petitioners' rights under the Speedy Trial Act.

3. Whether the district court properly showed additional leniency in sentencing petitioners Ponciano and Oscar Rasa, but not petitioner Pangelinan.

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In the Supreme Court of the United States

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PONCIANO CRUZ RASA, OSCAR CRUZ RASA, AND LEO SABLAN PANGELINAN,
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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, Pet. App. 1a-5a, is unpublished, but the judgment is noted at 924 F.2d 1063 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1991. A petition for rehearing was denied on September 11, 1991. Pet. App. 10a. The petition for a writ of certiorari was filed on November 5, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners were indicted in the District Court for the Northern Mariana Islands on two counts of wire fraud, in violation of 18 U.S.C. 1343, and two counts of extortion, in violation of 18 U.S.C. 1951 (Hobbs Act). Petitioners Ponciano and Oscar Rasa entered conditional guilty pleas to both wire fraud counts, reserving their right to appeal an alleged violation of the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.* Petitioner Leo Pangelinan was convicted after a jury trial on both extortion counts. The Rasas were each sentenced to three years in prison and a $1000 fine. Pangelinan was sentenced to concurrent terms of five years in prison and fined $10,000. The court of appeals affirmed. Pet. App. 1a-5a, 12a; C.A. Excerpts of Record 44.

1. On March 17, 1988, petitioners were indicted on charges of extortion and wire fraud in the District Court for the Northern Mariana Islands. On July 18, 1988, the district court, on the government's motion, dismissed the indictment for irregularities in the grand jury selection. On April 21, 1989, a newly constituted grand jury reindicted petitioners on two counts of extortion and two counts of wire fraud. Gov't C.A. Br. 2-3.

The second indictment charged that petitioners—a Senator of the Commonwealth of the Northern Mariana Islands, his brother and political adviser, and a consultant to the Commonwealth's Senate Committee on Resources, Development and Programs—engaged in a scheme to obtain kickback payments from Japanese businesses in exchange for petitioners' agreement to assist (or at least not to hurt) those businesses in their efforts to secure construction contracts from the Commonwealth. Pet. 3; Pet. App. 57a-70a. In connection with the scheme, petitioners

went to Japan to solicit a $165,000 bribe. Pet. App. 57a. Petitioners also caused wire transmissions to pass between New York and the Northern Mariana Islands, directing payments to be made to one of the Japanese firms. Pet. App. 60a-62a.

2. Based on its conclusion that the Speedy Trial Act would require trial to start within two days of the second indictment, the government moved for a continuance on the grounds that it would serve the "ends of justice" under 18 U.S.C. 3161(h)(8)(A). Pet. App. 3a; Gov't C.A. Br. 2-3. On May 18, 1989, the district court orally granted the government's motion after finding that defense counsel and the prosecution would not otherwise have reasonable time to prepare and that a miscarriage of justice might result. Pet. App. 20a. Counsel for petitioners expressly noted their lack of objection. Pet. App. 20a, 27a. After determining the availability of counsel, the court set trial for September 6, 1989, again without objection from petitioners. Pet. App. 22a-24a. Petitioners later moved to dismiss on the ground that the trial did not commence within the 70-day period required by the Speedy Trial Act of 1974, but the court denied their motion on the grounds explained in its earlier oral ruling. Pet. App. 6a-9a.

3. On September 1, 1989, the Rasas entered conditional guilty pleas under Fed. R. Crim. P. 11(a)(2), reserving their right to appeal the denial of their motion to dismiss. Pursuant to their plea agreements, the Rasas were each sentenced to three years in prison and fined $1000. Pangelinan, however, elected to go to trial. A jury acquitted him of the wire fraud charges, but found him guilty of the two extortion counts. He was sentenced to concurrent terms of five years' imprisonment and was fined $10,000. In explaining the basis of the sentencing disparity between

the Rasas and Pangelinan, the district court noted that cooperation with the government through the entry of a guilty plea should be reflected in sentencing. The court expressly stated, however, that it was not penalizing Pangelinan for exercising his right to a jury trial. Pet. App. 12a, 14a.

4. The court of appeals affirmed. Citing Fed. R. Crim. P. 11(a)(2), the court declined to consider several claims that petitioners Ponciano and Oscar Rasa had not reserved in writing in their conditional guilty pleas (including their claims that the wire fraud statute and Hobbs Act do not apply to the Commonwealth). Pet. App. 2a n.1. The court also held that the district court had properly granted the continuance, reasoning that it had made sufficient findings to satisfy the requirements of the Speedy Trial Act. Pet. App. 3a-4a. Finally, the court rejected Pangelinan's claim that he had received a more severe sentence than the Rasas because he exercised his right to a jury trial; the court relied on the district court's statement that it was not punishing Pangelinan for going to trial, but was giving the Rasas credit for pleading guilty. Pet. App. 4a-5a.

ARGUMENT

1. Petitioners contend the indictment failed to charge an offense because it was based on federal statutes—the wire fraud statute, 18 U.S.C. 1343, and the Hobbs Act, 18 U.S.C. 1951—that do not apply to the Northern Mariana Islands. Pet. 9-13.[1] Those

[1] This issue was raised for the first time on appeal, and only by petitioners Ponciano and Oscar Rasa. The court of appeals did not reach the issue on the ground that the Rasas had not preserved the claim in writing as part of their conditional plea agreement. Pet. App. 2a n.1. Petitioners contend, Pet. 14, that the court's unpublished opinion misapplied prior

statutes, however, extend to petitioners' offenses through Section 502 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (CNMI Covenant), Pub. L. No. 94-241, 90 Stat. 268 (1976) (*reprinted in* 48 U.S.C. 1681 note).[2] Section 502(a)(2) applies to the Northern Mariana Islands those laws "which are applicable to Guam and which are of general application to the several States as they are applicable to the several States." *Ibid.* Because the wire fraud statute and the Hobbs Act "are of general application to the several States" and apply to Guam, they apply to the Northern Mariana Islands.

Ninth Circuit cases holding that a guilty plea does not waive jurisdictional challenges. See, *e.g.*, *United States* v. *Caperell*, 938 F.2d 975, 977 (9th Cir. 1991). Even if such a claim otherwise merited this Court's review, but see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam), it would not warrant further review here because the indictment in fact charged an offense.

[2] At the conclusion of World War II, the United States was designated "trustee" of the Northern Mariana Islands pursuant to an agreement with the Security Council of the United Nations. Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189. That trusteeship agreement gave the United States full powers of legislation over the territory and authorized the application of "such of the laws of the United States as it may deem appropriate to local conditions and requirements." Art. 3, 61 Stat. 3302. On March 24, 1976, Congress approved the present Covenant to establish the Commonwealth in political union with the United States. See Pub. L. No. 94-241, 90 Stat. 263. The CNMI Covenant's provisions were phased in over time. CNMI Covenant, § 1003. Section 502 took effect on January 9, 1978. Proclamation No. 4534, 42 Fed. Reg. 56,593, 56,594 (1977). The trusteeship agreement officially terminated in November 1986. Proclamation No. 5564, 51 Fed. Reg. 40,399 (1986).

Petitioners contend, Pet. 11-13, that neither the wire fraud statute nor the Hobbs Act applies to the Northern Mariana Islands because those Acts are based on the Commerce Clause, U.S. Const., Art. I, § 8, Cl. 3, which is not one of the provisions of the Constitution that is specifically made applicable to the Northern Mariana Islands. See CNMI Covenant, § 501(a).[3] But the Covenant does not invalidate congressional legislation that was originally based on a constitutional provision that is not specifically referred to in the Covenant. Rather, the question of which federal statutes apply to the Northern Mariana Islands is addressed in Section 502(a) of the Covenant, 90 Stat. 268, which makes applicable to the Northern Mariana Islands all generally applicable laws that were in effect as of that section's effective date; in Section 105, 90 Stat. 264, which defines Congress's power to enact laws applicable to the Northern Mariana Islands;[4] and in Section 102, 90 Stat. 264,

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[3] Section 501(a) provides in pertinent part:

> To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States: Article I, Section 9, Clauses 2, 3, and 8; Article I, Section 10, Clauses 1 and 3; Article IV, Section 1 and Section 2, Clauses 1 and 2; Amendments 1 through 9, inclusive; Amendment 13; Amendment 14, Section 1; Amendment 15; Amendment 19; and Amendment 26 * * *.

90 Stat. 267.

[4] Section 105 provides in pertinent part:

> The United States may enact legislation in accordance with its constitutional processes which will be applicable to the Northern Mariana Islands, but if such legislation cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named

which provides that federal laws "applicable to the Northern Mariana Islands, will be the supreme law of the Northern Mariana Islands." Because both the wire fraud statute and the Hobbs Act were in force at the time the Covenant became effective, they apply to the Northern Mariana Islands through Section 502(a).

Although petitioners rely heavily, Pet. 11, on *Hillblom* v. *United States*, 896 F.2d 426 (9th Cir. 1990), that case actually supports the result here. In *Hillblom*, the court rejected the plaintiffs' contention that three existing federal statutes—the Swine Health Protection Act, 7 U.S.C. 3801 *et seq.*, the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*, and the Shipping Act of 1984, 46 U.S.C. 1701 *et seq.*—could not validly be applied to the Northern Mariana Islands because they were enacted under the authority of the Commerce Clause and the Territory Clause. 896 F.2d at 431 n.3 ("None of these acts was enacted in derogation of [the plaintiffs'] rights under the Covenant."); see *A & E Pac. Constr. Co.* v. *Saipan Stevedore Co.*, 888 F.2d 68, 71 (9th Cir. 1989) (applying the Shipping Act of 1984); *Micronesian Telecommunications Corp.* v. *NLRB*, 820 F.2d 1097, 1100-1101 (9th Cir. 1987) (NLRA). Thus, *Hillblom* and other decisions of the court of appeals contradict petitioners' assertion that the wire

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> therein for it to become effective in the Northern Mariana Islands. In order to respect the right of self-government guaranteed by this Covenant the United States agrees to limit the exercise of that authority so that the fundamental provisions of this Covenant * * * may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Islands.

90 Stat. 264.

fraud statute and the Hobbs Act violate the CNMI Covenant because they are Commerce Clause statutes.[5]

2. Petitioners claim that the district court violated the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, by excluding from the Speedy Trial Act computation that period during which the court continued the trial. Pet. 15-26.

The Speedy Trial Act generally requires a trial to commence within 70 days "from the filing date * * * of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs." 18 U.S.C. 3161(c)(1). The Act directs the district court to exclude the following period in computing the time within which a trial must begin:

> Any period of delay resulting from a continuance * * *, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

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[5] Petitioners also suggest that the prosecutions for official bribery violated the CNMI Covenant's guarantee of self-governance. Pet. 12-13. Petitioners' unsupported assertion that a prohibition against wire fraud and official bribery impermissibly intrudes into the Commonwealth's system of self-governance, as reflected in its "law and custom," Pet. 13, is without merit and does not warrant this Court's review.

18 U.S.C. 3161(h)(8)(A). The factors that a district court may consider in excluding time under Section 3161(h)(8)(A) include whether the failure to grant such a continuance "would be likely to * * * result in a miscarriage of justice," 18 U.S.C. 3161(h)(8)(B)(i), or "would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence," 18 U.S.C. 3161(h)(8)(B)(iv). A court may not toll the 70-day period by granting a continuance based on "general congestion of the court's calendar." 18 U.S.C. 3161(h)(8)(C).

The district court properly granted a continuance pursuant to Section 3161(h)(8). The government moved for a continuance because the Speedy Trial Act otherwise would have required trial to begin two days after the second indictment was filed. Gov't C.A. Br. 3. The government's motion accordingly requested that the court continue the trial for a sufficient period to allow defense counsel and the government a reasonable opportunity to prepare for trial. *Id.* at 5. After confirming that petitioners had no objection to the government's motion, Pet. App. 20a, the court granted the motion and set forth its reasons as required by the Act:

> The Court agrees that neither defense counsel nor the attorney for the government would have reasonable time necesary for effective preparation, taking into account the exercise in due diligence to prepare this case. Also, it would be unreasonable to expect adequate preparation in only the two days suggested. It would limit it and a miscarriage of justice might result, and therefore

> coupled with the fact that there is no opposition from the defense counsel, the motion is granted.

Pet. App. 20a.[6]

Petitioners do not contest the district court's decision to grant a continuance, Pet. 22, but contend that the September 6, 1989, trial date was unjustified because defense counsel were prepared to go to trial on July 17. Pet. 17-18, 22-24. The court, however, properly took into account the availability of counsel and the court in setting the trial for September 6. At the May 18, 1989, hearing, petitioners advised the district court that the earliest they could be prepared was July 17, 1989. Pet. App. 22a. The judge noted that he was going to be absent from the island on that date, and suggested starting the trial three days later. *Id.* at 21a-23a. Starting the trial on July 20, however, would have pushed an anticipated two-week trial into August 1989, and petitioner Pangelinan's counsel was unavailable during that entire

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[6] Because the court contemporaneously set forth detailed reasons for granting the government's motion, petitioners err in relying, Pet. 25, on cases that require contemporaneous findings under Section 3161(h)(8)(A). Although the court did not, in terms, state that "ends of justice * * * outweigh the best interest of the public and the defendant in a speedy trial," the court complied with the requirements of the statute by stating its reasons for so concluding. See 18 U.S.C. 3161(h)(8)(A). Indeed, the court's decision explicitly relied on two of the factors enumerated in Section 3161(h)(8)(B). See *United States* v. *Studnicka*, 777 F.2d 652, 658 n.20 (11th Cir. 1985). In any case, the government's motion asserted that the ends of justice would outweigh the best interest of the public and petitioners in a speedy trial, Gov't C.A. Br. 3; that unopposed motion and the court's order granting it must be viewed as complementary acts. See *United States* v. *Bruckman*, 874 F.2d 57, 61-62 (1st Cir. 1989).

month. *Id.* at 23a. In view of those factors, the court set a September 6, 1989, trial date, and counsel for all three petitioners explicitly noted their lack of objection to that date. *Id.* at 24a.

The court's selection of that date complied with the Speedy Trial Act. The Act contemplates the continuity of counsel as a reason for granting a continuance. See, *e.g.*, *United States* v. *Jones*, 712 F.2d 1316, 1323 (9th Cir.), cert. denied, 464 U.S. 986 (1983); *United States* v. *Scott*, 784 F.2d 787, 789 (7th Cir.), cert. denied, 476 U.S. 1145 (1986). Thus, the court properly took the unavailability of counsel into account. See, *e.g.*, *Scott*, 784 F.2d at 789; *United States* v. *Nance*, 666 F.2d 353, 357-358 (9th Cir.), cert. denied, 456 U.S. 918 (1982); *United States* v. *Edwards*, 627 F.2d 460, 461 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 872 (1980); *United States* v. *New Buffalo Amusement Corp.*, 600 F.2d 368, 374 (2d Cir. 1979).[7] Although the court contributed to the delay because the trial judge was not on the island on July 17 and could not start the trial until July 20, it was not improper to exclude time based on the court's availability. It is true that a continuance may not be based solely on general congestion in the court's calendar. 18 U.S.C. 3161(h)(8)(C). But there is nothing in the record to suggest that the judge's absence in this case had anything to do with congestion in the court's docket or the press of judicial business. The Speedy Trial Act contemplates that judicial unavailability, if

[7] While the district court could have severed the trial of petitioners Ponciano and Oscar Rasa from the trial of petitioner Pangelinan, petitioners apparently made no motion to sever. Even if they had, the question whether to continue the trial as to all three petitioners or grant a motion to sever would have been within the district court's discretion. See *Jones*, 712 F.2d at 1323.

unrelated to the general congestion of the courts, may in some circumstances justify an ends-of-justice continuance. See, *e.g.*, *United States* v. *Savoca*, 739 F.2d 220, 224 (6th Cir. 1984) (illness of judge), reh'g granted on other grounds, 761 F.2d 292 (6th Cir.), cert. denied, 474 U.S. 852 (1985); *Nance*, 666 F.2d at 358 n.11 (same). Petitioner has not cited, and we are unaware of, any decision holding that a judge's temporary absence from the jurisdiction cannot be grounds for a reasonable continuance under Section 3161(h)(8)(A).[8]

Finally, petitioners not only failed to object to the government's motion for a continuance, Pet. App. 24a, 27a, but also played a crucial role in determining the duration of the continuance through defense counsel's representations concerning their preparedness and availability, *id.* at 21a-24a. While petitioners cannot waive a speedy trial objection, their conduct in this case went beyond mere waiver of their speedy trial rights. Because petitioners were active participants in producing the delay of which they now complain, the district court properly declined to dismiss

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[8] In *United States* v. *Crane*, 776 F.2d 600 (6th Cir. 1985), upon which petitioner relies, Pet. 23, the trial judge set the trial for July 5, 1984, because he was leaving the country on June 21, 1984, and upon his return, would be presiding over another trial lasting until July 3, 1984. 776 F.2d at 602. The speedy trial date was June 22, 1984. *Ibid.* In finding that the judge's absence did not justify a continuance, the court of appeals reasoned that his "unavailability was caused at least partially by his presiding over another case and was therefore attributable to 'general congestion of the court's calendar.'" *Id.* at 605. Thus, the court of appeals specifically declined to rely on the judge's absence from the country in finding that his unavailability was not a proper basis for a Section 3161(h)(8)(A) continuance.

their indictments based on that delay. See, *e.g.*, *United States* v. *Kucik*, 909 F.2d 206, 211 (7th Cir. 1990), cert. denied, 111 S. Ct. 791 (1991); *United States* v. *Gallardo*, 773 F.2d 1496, 1506 (9th Cir. 1985).

3. Petitioner Pangelinan contends that the district court improperly sentenced him more severely than his co-defendants because they pleaded guilty and he exercised his right to a jury trial. Pet. 26-29. He relies, Pet. 26-27, on the trial court's observation that a defendant's sentence should reflect his level of co-operation with the judicial system, including the entry of a guilty plea.

A sentencing court may not punish a defendant for exercising his right to trial. See, *e.g.*, *United States* v. *Carter*, 804 F.2d 508, 513 (9th Cir. 1986). But a court may, consistent with the Constitution, show leniency to those who plead guilty, which extends a substantial benefit to the government and may indicate that a shorter time frame is needed for rehabilitation. *Brady* v. *United States*, 397 U.S. 742, 752-753 (1970).[9] Thus, a grant of leniency to those co-defendants who cooperate with the government and display contrition for their crimes is not a penalty to others who exercise their right to stand trial. See, *e.g.*, *United States* v. *Brown*, 761 F.2d 1272, 1278 (9th Cir. 1985); *United States* v. *Thompson*, 476 F.2d 1196, 1201 (7th Cir.), cert. denied, 414 U.S. 918 (1973).

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[9] That principle is reflected in the United States Sentencing Guidelines. See, *e.g.*, Sentencing Guidelines § 3E1.1 (acceptance of responsibility). Because the offenses in this case occurred before November 1, 1987, the Guidelines were not applicable to petitioners' sentences.

The district court in this case did not penalize petitioner Pangelinan, but merely showed greater leniency to his two co-defendants, who pleaded guilty. The court expressly stated that it "was not the intention of the court to punish Mr. Pangelinan for using his constitutional right of going to trial." Pet. App. 14a. The court further observed that the maximum sentence for petitioner Pangelinan's offenses was 20 years in prison and that concurrent five-year sentences for his two counts of conviction were "certainly not excessive." *Ibid.* Finally, the court found that Pangelinan had not been candid with the jury. *Ibid.* On this record, the court of appeals properly held that the disparity in sentences did not reflect a penalty against Pangelinan for going to trial, but rather reflected a credit to his co-defendants for cooperating with the government by pleading guilty.[10]

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[10] The cases on which petitioner Pangelinan relies, Pet. 28-29, do not help him. In *United States* v. *Medina-Cervantes*, 690 F.2d 715, 716 (9th Cir. 1982), the trial court sentenced the defendant to the statutory maximum after noting that he "was just thumbing his nose at our judicial system" by seeking a trial. Similarly, the district court in *United States* v. *Hutchings*, 757 F.2d 11, 13-14 (2d Cir.), cert. denied, 472 U.S. 1031 (1985), imposed the maximum sentence because the defendant "was clearly and unquestionably guilty, and there should have been no trial." And in *United States* v. *Stockwell*, 472 F.2d 1186, 1188 (9th Cir.), cert. denied, 411 U.S. 948 (1973), the court informed the defendant that he would receive a sentence of three years if he pleaded guilty, but five to seven years if he went to trial; the defendant asserted his jury trial right and was sentenced to seven years after being convicted. Unlike the present case, none of those decisions addressed a sentencing disparity that reflected the acceptance of responsibility by some but not all of the defendants.

In any case, petitioner Pangelinan does not contest the validity of applicable Ninth Circuit case law, but claims that

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1992

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the unpublished ruling of the court of appeals conflicts with the law of the circuit. Pet. 28. That claim of intra-circuit conflict does not warrant this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45350

(3)

Supreme Court, U.S.
FILED
MAR 20 1992
OFFICE OF THE CLERK

No. 91-758

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

PONCIANO CRUZ RASA,
OSCAR CRUZ RASA,
LEO SABLAN PANGELINAN,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY TO UNITED STATES BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO UNITED STATES BRIEF IN OPPOSITION

PREFATORY STATEMENT

In its Opposition Brief, the Government has restated — and significantly altered — the questions raised in our Petition. Whether by craft or simple inadvertence, the Government's restated questions differ markedly from those originally raised.

This Reply is filed solely to dispel any misconceptions which may have resulted from the Government's erroneous and misleading restatement of the questions actually presented by our Petition and to invite the Court's careful consideration of the real issues in this case.

In order to provide a ready reference to the questions actually presented, our discussion of each is preceded by a reiteration of those questions as they appear in the Petition.

QUESTION 1.

DID THE REFUSAL OF THE NINTH CIRCUIT TO CONSIDER WHETHER THE GOVERNMENT'S INDICTMENT CHARGED A LEGALLY COGNIZABLE OFFENSE AGAINST TWO OF THE PETITIONERS, BECAUSE THIS JURISDICTIONAL CHALLENGE WAS NOT EXPRESSLY PRESERVED IN THEIR FEDERAL RULE OF CRIMINAL PROCEDURE 11(A)(2) CONDITIONAL GUILTY PLEAS, SO FAR DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION?

As set forth with great particularity in the Petition, the Ninth Circuit *refused* to consider the merits of a jurisdictional attack on the indictment for failure to state a claim *solely* because the argument had not been expressly preserved in earlier conditional guilty pleas. (Petition, pp. 7, 14.)

Perhaps by design, perhaps by inadvertence, the Government's Brief in Opposition totally fails to address whether the Ninth Circuit's flat refusal to consider this jurisdictional challenge, raised for the first time on appeal, impermissibly violated both long-established precedent and the express provisions of Federal Rule of Criminal Procedure 12(b)(2) which hold that jurisdictional defects — including the sufficiency of an indictment — may be raised *at any time* during the pendency of the proceedings, even after a guilty plea has been entered.

United States v. Caperell, 938 F.2d 975 (9th Cir. 1991); *United States v. Briscoe*, 428 F.2d 954 (8th Cir. 1970), *cert. den.* 400 U.S. 966 (1970); Fed. R. Crim. P. 12(b)(2).

Indeed, rather than addressing this issue, the Government argues (in a footnote) that the Circuit's refusal to consider Petitioners' jurisdictional argument was somehow justified "because the indictment in fact charged an offense." (Opposition Brief, p. 5, N.1.)

This argument, of course, begs the question. The Government's *ipse dixit* that Petitioners will eventually lose on the merits is beside the point.

In the instant proceeding, Petitioners seek *thorough* briefing, argument, and judicial analysis of the merits of their jurisdictional argument. The Government, on the other hand, argues that it is alright that such briefing, argument, and analysis have not been provided because Petitioners are wrong and would ultimately lose, in any event. In support of this argument, the Government advances a cursory, woefully incomplete, and basically misleading three-page discussion of the highly complex and important question of the nature and scope of the interrelationship between the United States and the Commonwealth of the Northern Mariana Islands as proof-positive that if the Ninth Circuit, or this Court, were to grant full and fair consideration to this thorny and perplexing question (as Petitioners seek), the Government would undoubtedly prevail. Hence, the Government argument goes, there is no reason to provide such consideration.

Petitioners respectfully disagree.

Whether the question of how much federal intermeddling in Commonwealth affairs is enough is addressed in this case or another; before this Court, the Ninth Circuit, or the federal district court in Saipan, the question must

and eventually will be addressed. It is already being addressed both in the political arena[1] and in Commonwealth courts[2].

We have not, as the Government would have this Court believe, raised in the Petition the question of whether the federal legislation Petitioners were charged with violating is applicable within the Commonwealth. We have only asserted that this is a bona fide question which should be fully and fairly addressed because it has merit and because its answer will have ramifications far beyond the scope of this case.

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[1]*See, e.g.*, "Hearing before the Subcommittee on Insular and International Affairs of the Committee on Interior and Insular Affairs, House of Representatives, One Hundred Second Congress, First Session, on H.R. 2575" San Francisco, June 17, 1991, #102-6; Lizabeth A. McKibben, "The Political Relationship Between the United States and Pacific Islands Entities: The Path to Self-Government in the Northern Mariana Islands, Palau, and Guam," 31 Harv. Int'l L.J. 257 (Winter, 1990). *See also*, Harry G. Prince, "The United States, the United Nations, and Micronesia: Questions of Procedure, Substance, and Faith," 11 Mich. J. Int'l Law 11 (Fall, 1989).

[2]*See, e.g., Sablan v. Inos*, No. 91-18 (C.N.M.I. Dec. 26, 1991) (order reversing dismissal), Appendix A hereto. In *Sablan*, the Supreme Court of the Commonwealth expressly held that the Covenant between the United States and the people of the Commonwealth "... retains in the people of the CNMI the sovereign right to self-government which they had prior to and at the time they entered into the Covenant." (*Sablan*, Appendix A-7.)

Wrote the Commonwealth Supreme Court:

> "We interpret the term 'self-government' as used in the Covenant, at a minimum, to mean that the people of the Northern Mariana Islands will *enact* the laws of the CNMI; that they will *interpret* the laws of the CNMI; and that they will *execute* the laws of the CNMI." (*Id.*, emphasis in original.)

A principal thrust of the Petition is that this perplexing question deserves to be raised and answered in the context of a full and fair appellate proceeding before this Court or, in the alternative, before the Ninth Circuit.

QUESTIONS 2. AND 3.

DID THE TRIAL COURT'S CONTINUANCE OF PETITIONERS' TRIAL WELL PAST THE DATE REQUIRED BY THE SPEEDY TRIAL ACT, SOLELY TO ACCOMMODATE THE PERSONAL "CONVENIENCE" OF ONE DEFENSE LAWYER AND THE TRIAL COURT, AND THE SANCTION OF THAT TRIAL-COURT CONDUCT BY THE COURT OF APPEALS, SO FAR DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION?

DOES AN APPARENT CONFLICT AMONG DECISIONS OF THE NINTH CIRCUIT, ITSELF, AND VARIOUS OTHER CIRCUITS WARRANT CONSIDERATION BY THIS COURT OF WHETHER A TRIAL COURT MAY RETROACTIVELY JUSTIFY GRANTING AN "ENDS OF JUSTICE" TRIAL CONTINUANCE WELL PAST THE DATE REQUIRED BY THE SPEEDY TRIAL ACT BASED UPON *POST HOC* CONSIDERATIONS OF THE FACTORS SPECIFIED IN THE ACT?

The Government's Opposition seeks to recast the two speedy trial questions posed by the Petition to exclude both consideration of the propriety of the trial court's attempt at *post hoc* justification and consideration of *the public's right* to speedy trials.

In their simplest form, the questions actually raised by the Petition are:

1. Whether setting a trial date *months* past the statutory deadline and *months* past the time when all counsel (Government and defense alike) were ready for trial, *solely* for the *personal convenience* of the trial judge and one of several defense lawyers, satisfies Constitutional and statutory speedy trial requirements; and

2. Whether *post hoc* consideration and recordation of the statutory factors mandated by the Speedy Trial Act are legally permissible.

The Government concedes (as it must) that its initial motion sought continuance of the trial "for a sufficient period to allow defense counsel and the Government a reasonable opportunity to prepare for trial" (Opposition Brief, p. 9); concedes (as it must) that counsel were prepared to go to trial on July 17 of 1989 (*Id.*, p. 10); concedes (as it must) that the trial court nevertheless continued the trial to a date almost five months after expiration of the statutory deadline and almost two months after *all* counsel agreed *on the record* they would be prepared to commence trial (Petition, Appendix E, p. 21a-24a); and concedes (as it must) that court congestion is *not* a permissible basis for such a continuance (Opposition Brief, p. 11).

What the Government argues in light of these unavoidable concessions is that the naked "unavailability of counsel" and "judicial unavailability" — *for whatever reason, no matter how trivial or avoidable* — is an appropriate basis for ignoring the Speedy Trial Act deadline. (Opposition Brief, p. 11.) This, we submit, is not (nor should it be) the law.

The Government chides Petitioners for failing to cite a case holding that "a judge's temporary absence from the jurisdiction cannot be grounds for a reasonable continuance" under the Act. The simple response to this criticism is that it is the Government's burden to bring defendants to timely trial and it is the Government's burden to justify its failure to do so. *United States v. Jones,* 524 F.2d 834, 849 (D.C. Cir. 1975). They have not done so.

Nor does the case the Government cites in support of its proposition that an unexplained judicial absence from the jurisdiction somehow justifies an ends-of-justice continuance stand for that proposition at all. In fact, it holds to the contrary:

> "The trial judge's unavailability was caused at least partially by his presiding over another case and was therefore attributable to 'general congestion of the court's calendar.' Thus, *the judge's absence is not a proper reason for an ends of justice continuance.*"

United States v. Crane, 776 F.2d 600, 605 (6th Cir. 1985, emphasis added.)

If a judge's absence in the pursuit of his judicial duties is insufficient to warrant an ends-of-justice continuance, as was the case in *Crane, a fortiori,* his absence — and the absence of defense counsel — *for their personal convenience* must be insufficient. The cases cited by the Government relating to judicial unavailability due to illness simply do not change this result.

The Government also seeks to make much of the acquiescence of defense counsel to the date ultimately set, although conceding (as it must) that Petitioners could not waive the speedy trial objection. (Opposition Brief, p. 12.) This inability of the defendants alone to waive the right, of course, reflects the strong *public interest* in

speedy trials reflected in the Speedy Trial Act, a factor the Government fails to mention. *See, United States v. Brooks*, 697 F.2d 517, 520 (3d Cir. 1982).

Notwithstanding the Government's attempt to recast the speedy trial issue, it simply cannot be denied that the continuance was granted *before* the trial court considered the factors required by the Act and that its inordinate length was predicated on nothing more than the *personal convenience* of the trial judge and one of the defense counsel.

Permitting such conduct, Petitioners have already asserted, would make a mockery of the Constitutional and statutory guarantees of a speedy trial.

QUESTION 4.

DID THE IMPOSITION BY THE TRIAL COURT OF A DISPROPORTIONATELY HEAVY SENTENCE ON ONE OF THE THREE PETITIONERS BECAUSE HE EXERCISED HIS RIGHT TO A JURY TRIAL AND CONSEQUENTLY DID NOT "COOPERATE" WITH THE PROSECUTION, AND THE RELUCTANT SANCTION OF THAT TRIAL-COURT'S CONDUCT BY THE COURT OF APPEALS, SO FAR DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION?

As with the first two issues, the Government disingenuously seeks to restate the third major question raised by our Petition in terms of the *leniency* purportedly shown in sentencing two "cooperative" co-defendants rather than in the stated terms of the *disproportionately heavy sentence* imposed on the third defendant, PANGELINAN,

for choosing to go to trial and not "cooperate" with the prosecution.

The fact is, however, that the record is devoid of evidence that leniency to the cooperative co-defendants was the reason for the disproportionate sentences. Rather, the record clearly shows that, by imposing a significantly longer sentence on the defendant who chose to go to trial, the sentencing judge intended to send a message "out to the community" that defendants who choose to exercise their Constitutional right to a jury trial, but who do not prevail, do so at the risk of receiving a disproportionately harsh sentence (in this case imprisonment some 66% longer than his "cooperative" co-defendants). (Petition, Appendix D, p. 12a.)

The clear meaning of the sentencing judge's candidly stated reasons for this different sentence (Petition, Appendix D, p. 12a) cannot be erased by his subsequent, and clearly inconsistent, denial that the lengthy sentence was intended as a punishment for "using his constitutional right of going to trial." (Petition, Appendix D, p. 14a) Even accepting this *pro forma* disclaimer as candid and true, the judge did not attempt to ameliorate, or even address, his criticism of PANGELINAN for "not cooperating" with the prosecution.[3]

While the Government argues that the disparity in sentences actually reflects *lenience* in sentencing PANGELINAN's co-defendants because they were cooperative (rather than *severity* with PANGELINAN for his lack of cooperativeness), the Government *does not, and*

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[3]The Ninth Circuit disapproved of the judge's initial candor, it will be recalled, finding his "... comments ... troublesome [making] this a very close issue on appeal." (Petition, Appendix A, p. 5a, N.2.)

cannot, point to anything in the record to support its argument that the clearly disparate sentences "reflected a credit to [PANGELINAN's] co-defendants for cooperating with the Government by pleading guilty." (Opposition Brief, p. 14.)

What the record does make absolutely clear is that the severity of PANGELINAN's sentence *was not*, as the law requires, *based "solely upon the facts of his case and his personal history . . ." United States v. Stockwell*, 472 F.2d 1186, 1188 (9th Cir. 1973), *cert. den.*, 411 U.S. 948 (1973) (emphasis added).[4]

Nor does the Government support its *ipse dixit* that the authorities cited in our Petition are not helpful. (Opposition, p. 14, N.10.) In fact, each of those cases holds that *it is improper* for a judge to consider a defendant's exercise of his constitutional right to a jury trial in imposing sentence. *United States v. Hutchings*, 757 F.2d 11, 14 (1985); *United States v. Medina-Cervantes*, 690 F.2d 715 (1982); and *United States v. Stockwell*, 472 F.2d 1186 (1973).

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[4]The Government clearly concedes (as it must) that punishing a defendant for going to trial is improper. In support of the distinction it seeks to draw between the sentencing judge's imagined leniency to PANGELINAN's cooperative co-defendants and his punishment of PANGELINAN, the Government cites United States Sentencing Guideline § 3E1.1.

Section 3E1.1 was not in effect at the time of Pangelinan's sentencing. Further, even though § 3E1.1 recommends reduced sentences to those who accept responsibility for their criminal conduct, it does not sanction punishing a defendant for exercising his constitutional right to a jury trial. Actually, this guideline is applicable "without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the court or jury . . . " U.S.S.G. 3E1.1(b).

CONCLUSION

For the reasons set forth in our Petition, and above, we respectfully request that the Petition be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF THE
COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS

HERMAN S. SABLAN and ANTONIO T. SALAS,
Plaintiffs/Appellants,

vs.

ELOY INOS, Director of Finance; CNMI Department of Finance; Division of Revenue and Tax; Commonwealth Government, LORENZO I. GUERRERO, Governor of the CNMI,
Defendants/Appellees.

APPEAL NO. 91-018
CIVIL ACTION NO. 91-734
Filed: December 26, 1991

ORDER

Argued and Submitted December 23, 1991

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Counsel for Defendants/ Appellees:	Eric Smith Assistant Attorney General Attorney General's Office 2d Administration Building Saipan, MP 96950

BEFORE: VILLAGOMEZ and BORJA, Justices, and HILLBLOM, Special Judge.

VILLAGOMEZ, Justice:

I.

On August 19, 1991, we issued a temporary injunction and ordered the Superior Court to take custody and constructive possession of all income tax documents and information without taking actual possession thereof. The temporary injunction is still in effect. In December, 1991, the Inspector General of the Department of the Interior subpoenaed the Governor of the Commonwealth of the Northern Mariana Islands ("CNMI") to produce all documents related to tax returns and information filed with the Department of Finance.

As a result of the subpoena, the parties requested that we expedite oral argument on this appeal or to decide the matter without oral argument. We decided to hear oral argument on December 23, 1991. At oral argument both parties pressed for an expedited decision on this matter.

In view of the exigency, we have decided to issue an order at this time, to be followed by an opinion setting forth our analysis and reasoning. Our expedited decision herein is based on the briefs, arguments of counsel, and review of relevant legal documents.

II.

This is an appeal (from the dismissal of an action) by two Commonwealth taxpayers who sought to enjoin the Director of Finance from disclosing their confidential[1]

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[1] 4 CMC § 1701. *Application of the Internal Revenue Code, in General.*

• • •

(d) *Confidentiality, Disclosure, and Coordination.*

(1) Returns and return information shall be confidential, and except as authorized by NMTIT Section 6103, no officer or em-

tax documents and related information to the Inspector General after the Inspector General informed (by letters) the CNMI Governor of its intent to audit the CNMI's accounts and to review all documents related to individual tax returns.[2]

The trial court determined that the Inspector General is an indispensable party[3] in this case. When the plaintiffs did not include the Inspector General as a party, it dismissed the action pursuant to Rule 19, Com.R.Civ.P.

Plaintiffs contend that the trial court erred as a matter of law, arguing (1) that the Inspector General is not an indispensable party and the trial court misinterpreted Rule 19, (2) the trial court should have issued an injunction and taken custody and constructive possession of the tax returns, and (3) an application of 48 U.S.C. § 16991(b) that would require the CNMI to disclose confidential tax returns to the Inspector General would violate the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America ("Covenant"). Comm. Code B-101.

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ployee of the Commonwealth shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or employee or otherwise. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

[2]The Inspector General did not inform the individual taxpayers of his intent to review their tax returns. Nor did he serve them with the subpoena.

[3]The Inspector General did not attempt to intervene in the trial court or appear as an amicus in this appeal. It has been aware of the complaint filed on July 9, 1991, and the appeal filed on August 20, 1991.

Defendants oppose any issuance of an injunction on the basis that the CNMI Government does not intend to disclose, or release to the Inspector General, the tax return information.

III.

The issues raised on appeal are:

1. Whether the Superior Court erred in concluding that the Inspector General is an indispensable party.

2. Whether the Superior Court should have prohibited the CNMI from disclosing tax returns and return information to the Inspector General.

3. Whether the Superior Court should have taken custody and constructive possession of the tax return information.[4]

IV.

It is our opinion that the Inspector General is not an indispensable party in this case. 48 U.S.C. § 1691(b) authorizes the Inspector General to audit the "accounts" of the CNMI. The information contained in the tax returns of the plaintiffs are properties of the taxpayers and are not "accounts" of the CNMI. The tax returns filed with the Commonwealth Government are confidential documents pursuant to 4 CMC § 1701(d)(1).

The taxpayers have the right to privacy under § 10, Article I, CNMI Constitution. Since the information contained in the tax returns are the properties of the taxpayers, only the taxpayers have the right to authorize the

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[4]Because of our ruling on the other issues, this issue need not be addressed.

release of such information. Any release of the information, without such authorization, to any person not authorized by local law, or any U.S. law made applicable in the CNMI through the Covenant, would violate the taxpayer's right to privacy, the confidentiality of the information, and the right to self-government.[5]

V.

The Superior Court should have prohibited the CNMI from disclosing tax returns and return information to the Inspector General.

Whether the CNMI may disclose to the Inspector General the confidential tax returns and return information depends upon whether 48 U.S.C. § 1681(b) applies in the CNMI.

The applicability of 48 U.S.C. § 1681(b) to tax returns in the CNMI depends upon whether it is authorized by the Covenant and does not violate the fundamental provisions of the Covenant. If the Covenant does not authorize its applicability or if it contradicts any fundamental provision of the Covenant (such as §§ 101 and 103), then it is void as to its applicability in the CNMI. See Analysis of the Covenant, 19 (1975).

The Covenant is an agreement entered into between the United States Government and the Government/people of the Northern Mariana Islands. They entered into the agreement as two separate, but equal sovereign entities.[6]

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[5]Applicability of U.S. laws in the CNMI and the right to self-government are further discussed below.

[6]". . . the Charter of the United Nations and the Trusteeship Agreement between the Security Council of the United Nations and the United States of America guarantee to the people of the Northern

The Covenant governs the relationship between the two parties.[7]

The expressed purpose of the Covenant is "to establish a self-governing commonwealth for the Northern Mariana Islands . . . and to define the future relationship between the Northern Mariana Islands and the United States." Preamble to the Covenant.

The Covenant is an agreement approved by the United States through a joint resolution which states:

> Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled, that the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, the text of which is as follows, is hereby approved.

House Joint Resolution 549 (1975).

The Covenant, as an agreement, may be amended or terminated only by agreement of the parties thereto, or as provided for in the Covenant, but not by the unilateral action of any one party. Covenant, § 105.

Mariana Islands the right freely to express their wishes for self-government or independence." Preamble to the Covenant. The Preamble further states "This Covenant will be mutually binding when it is approved by the United States, by the Mariana Islands District Legislature and by the people of the Northern Mariana Islands in a plebiscite, constituting on their part a *sovereign* act of self-determination." (Emphasis added) *See also, Wabol v. Villacrusis*, No. 89-05, 1 N.Mar.I. 19 (1989).

[7] "The relations between the Northern Mariana Islands and the United States will be governed by this Covenant which, together with those provisions of the constitution, treaties and laws of the United States applicable to the Northern Mariana Islands, will be the supreme law of the Northern Mariana Islands." Covenant, Art. I, § 102.

Article I, Section 103 of the Covenant provides that the people of the Northern Mariana Islands will have the right of local self-government. This provision retains in the people of the CNMI the sovereign right to self-government which they had prior to and at the time they entered into the Covenant. This section cannot be unilaterally amended by either party to the Covenant.[8]

We interpret the term "self-government" as used in the Covenant, at a minimum, to mean that the people of the Northern Mariana Islands will *enact* the laws of the CNMI; that they will *interpret* the laws of the CNMI; and that they will *execute* the laws of the CNMI.

The CNMI's right to self-government is with respect to internal affairs[9] (Covenant, § 103), as opposed to foreign affairs and defense (Covenant, § 104).

At the same time, the CNMI has agreed to relinquish its right of self-government and to apply U.S. laws in certain matters.

Article V of the Covenant sets forth certain provisions of the U.S. Constitution and laws which would apply or would be incorporated by reference in the CNMI in contradiction to the principle of self-government. Section 105 of the Covenant specifically authorizes the United States to enact laws applicable in the CNMI provided that

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[8]Article I, Section 105 of the Covenant provides:

> . . . Articles I, II and III and Sections 501 and 850, may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Islands.

[9]The tax laws of the CNMI, the manner in which the CNMI collects taxes, the tax returns filed with the government, and all related information are matters of internal affairs, not related to foreign affairs or defense. In the exercise of self-government, the CNMI may enact, interpret, and execute laws related to local taxation.

such laws do not contradict Articles I, II, or III of the Covenant.

It is our opinion that 48 U.S.C. § 1681(b) is not made applicable in the CNMI by the Covenant because it contradicts Section 103 thereof. Therefore, it is void and has no force and effect in the CNMI.[10]

The dismissal of this action by the Superior Court will be REVERSED. This case, upon issuance of our opinion, will be REMANDED for the trial court to determine if it should issue a permanent injunction and whether it should relinquish custody and constructive possession of the tax returns and return information. The temporary injunction we ordered shall continue in effect until disposition of this case.

Dated this 26th day of December, 1991.

RAMON G. VILLAGOMEZ
Associate Justice

JESUS C. BORJA
Associate Justice

LARRY L. HILLBLOM
Special Judge

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[10]"Thus any attempt by the United States or the Northern Marianas to circumvent the fundamental aspects of the Covenant would be void and of no effect." Analysis of the Covenant 19 (1975).